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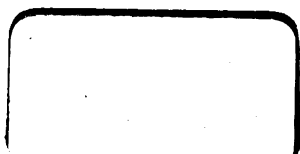
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THE

EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. II.

EASTER TERM, 20 VICT., to HILARY TERM, 21 VICT.,
BOTH INCLUSIVE.

BY

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AND

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J U D G E S
OF THE
COURT OF EXCHEQUER,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.

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Sir SAMUEL MARTIN, Knt.

Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.

Sir WILLIAM HENRY WATSON, Knt.

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ATTORNEY-GENERAL.

Sir RICHARD BETHELL, Knt.

SOLICITORS-GENERAL.

The Right Hon. JAMES STUART WORTLEY.

Sir HENRY SINGER KEATING, Knt.



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ERRATA.

Page 379, marginal note, line 17, for "(O 1)" read (D 1).

Page 814, line 5, for "and" read "for."

Exchequer Reports.

EASTER TERM, 20 VICT.

1857.

April 15 & 17.

FANSHAWE v. PEET, Public Officer, &c.

ACTION against the defendant as the public officer of the Union Bank of Manchester for money lent and money had and received. Plea,—that the plaintiff before and at the commencement of the suit was and still is indebted to the bank in an amount equal to the plaintiff's claim which the bank offers to set-off, on a bill of exchange for 391*l.* 1*s.* 7*d.*, drawn by the plaintiff, payable four months after date, on Begbie, Wiseman & Co., accepted by them, and indorsed by the plaintiff to the bank: that Begbie, Wiseman & Co. did not pay the bill when due, though the same was duly presented to them for payment, of which the plaintiff had notice. Issue thereon.

At the trial before *Martin, B.*, at the last Liverpool assizes, without a jury, it was admitted that the plaintiff had an account with the Union Bank of Manchester as his bankers, in respect of which the bank owed him

Upon a bill dated September 8, 1856, drawn on B. & Co., payable in London at four months after date. An acceptance was written as follows:

"Accepted. Payable at Messrs. Overend, Gurney & Co., London. No. 1756. Due 11 Decr. 1856. B. & Co." The words before the signature were written in red ink and in a hand different from the signature.—*Held*, that if it was a question of law the bill must be

taken to have been accepted according to its tenor; and that if it was a question of fact, there was evidence that the words "due 11 Decr. 1856" were not intended to qualify the acceptance.

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391*l.* 1*s.* 7*d.*, subject to any right of set-off on a bill of exchange which was as follows:—

No. £391: 1*s.*: 7*d.*:
Manchester, 8th September, 1856.
Four months after date of myself Three
hundred ninety-one pounds 7*s.* 1*d.* value received.
Messrs. Begbie, Wiseman & Co.,
Glasgow,
Payable in London.

Accepted by Messrs. Overend, Gurney & Co.,
London.
Due 11 Decr 1856.
No. 1756.
Begbie, Wiseman & Co.

The signature of the acceptors was in a different hand from the words written above it, the whole of which were in red ink. The bill was indorsed by the plaintiff to the Union Bank several days before the 11th of December, 1856, but was not presented for payment till the 10th of January, 1857, the 11th being Sunday. It was admitted that on the 11th of December Overend, Gurney & Co. had in their hands funds of Begbie, Wiseman & Co. to an amount exceeding the sum mentioned in the bill.

Upon these facts the ^{plaintiff}~~defendant~~ contended that the bank, not having presented the bill on the 11th of December, had made it their own by laches. The learned Judge directed a verdict for the defendant, giving leave to the plaintiff to move to enter a verdict for him.

Hugh Hill now moved accordingly.—This bill was accepted, payable on the 11th December. The drawee of a bill of exchange is at liberty to qualify his acceptance, as by annexing a condition, or by enlarging or diminishing the time of payment: per *Richardson, J., Rowe v. Young* (a). That case shews that in ascertaining what the

(a) 2 Brod. & B. 165. See p. 190.

contract of the acceptor really is, no words written above the signature of the acceptor can be rejected. [*Bramwell*, B.—If a four months bill is drawn it is clearly a dishonour of the bill to accept it as a three months bill.]

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POLLOCK, C. B.—The words “No. 1756. Due 11 Decr. 1856,” appear to be the mere memorandum of the clerk, who prepared the bill for the acceptor’s signature, as to the time at which it would become payable. The bill purports to be accepted according to its tenor; then there is something which is said to be inconsistent with that. The case was before my brother *Martin*, who had the powers of a jury, and I think that he was right in deciding that the bill was accepted according to its tenor. There will, therefore, be no rule.

BRAMWELL, B.—I am of the same opinion. The question is, what is the meaning of the acceptance. After the words “accepted, payable at Messrs. Overend, Gurney & Co., bankers, London,” the words “No. 1756. Due 11 Decr. 1856” occur. Does that mean accepted to be due on the 11th of December? I think that the number refers to the number of the bill in the book of the drawee, and if this is a matter of law I have no difficulty in deciding that the time of payment mentioned is not a qualification of the acceptance, but simply an untrue description of the bill.

CHANNELL, B.—I also think that there should be no rule. The matter was left to the judge, who had to decide the question, whether it was one of law or fact. Mr. *Hill* must make out that the words formed part of the acceptance. The bill seems to have been prepared for signature by a clerk. If the question is one of law I think that the accept-

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ance terminates at the third line; if it is a question of fact I should attach importance to the number, as shewing that the date was not a qualification of the acceptance, but a mere memorandum.

MARTIN, B.—At the trial, after consulting my brother *Crompton*, I thought that if a drawee intends to qualify his acceptance he must do so in unambiguous language. Here it cannot be doubted but that if the bill had been presented to the acceptor at the end of three months he would have refused payment.

Rule refused.

April 20.

SCHNEIDER and Another v. FOSTER and Others.

The defendant bought goods upon the following terms of payment:—“Four months bill on the 10th of the month following delivery, or 2% for cash.” After the delivery of the goods he paid part of the price in cash. *Held*, that he had exercised his option of paying ready money, and therefore that the plaintiff might sue him for goods sold without waiting for the expiration of the four months.

DECLARATION, dated November 4, 1856, for goods sold and delivered. Plea:—never indebted.

At the trial before *Crowder, J.*, at the last assizes for the county of Stafford, it appeared that the action was brought to recover the balance due from the defendants under the following contract:—“Sold to Messrs. The Chillington Iron Co. (the defendants) Two thousand lots of our best Blast Furnace Iron Ore at 23*s.* per lot of lbs. 2400 delivered at their siding at the London and North Western line of Railway. Terms of payment four month's bill on the 10th of the months following delivery, or 2% for cash.

Schneider, Hannay and Co.”

The deliveries of ore were in March to the value of 485*l.* 10*s.*; in April, 349*l.* 5*s.* 11*d.*; in May, 110*l.* 14*s.* 1*d.*; in June, 552*l.* 2*s.* 0*d.*; in July, 401*l.* 13*s.* 7*d.*, making together 1899*l.* 5*s.* 7*d.* If a bill had been given for the 401*l.* 13*s.* 7*d.* for iron supplied in July it would not have been due till December, 1856. The defendants had paid

900*l.* on the 27th of June, and 892*l.* 16*s.* 1*d.* on the 29th of August, making together 1792*l.* 16*s.* 1*d.* At the close of the plaintiffs' case the defendants' counsel submitted that the plaintiffs must be nonsuited, on the grounds that the action was brought too soon, and that the declaration should have been on the special contract. The learned Judge thought that the defendants had exercised the option of paying in cash, and the jury under his direction found a verdict for the plaintiffs.

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Pigott now moved to set aside the verdict and for a new trial.—The plaintiffs had no right to sue for goods sold and delivered until after four months had elapsed; *Miller v. Shawe* (a). The defendants never elected to pay cash, except to the extent of the payment actually made by them. [*Martin*, B.—The defendants had an option to pay by bill or in cash; they had no right to pay partly by bill and partly in cash. They have put it out of their power to give a bill for the whole amount. *Pollock*, C. B.—The defendants paid part of the sum of 401*l.* 13*s.* 7*d.* for goods supplied in July in cash; that shews that they considered it as payable presently.]

Rule refused.

(a) 4 East, 149.

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April 22.

KNIGHT and Another v. THE GRAVESEND AND MILTON WATERWORKS COMPANY.

COVENANT.—The declaration set out a deed made between the defendants and the plaintiffs, reciting that the directors of the Company had lately determined to construct a reservoir, well, shafts, tunnels and other works on the premises of the Company, and *that the engineers of the Company had prepared the necessary drawings for the same and made a general specification, referring to the said drawings, of all the works to be done, and of the materials to be found and provided for that purpose*; and that the plaintiffs had agreed with the directors of the Company to construct, make and complete the said intended reservoir, well, shafts and tunnels, and to provide and execute all the works particularized in the said specification, and which may be implied therefrom, or be incidental thereto for 3880*l.*, and to execute all the works particularised in the said specification, and which might be implied therefrom or incidental thereto, for 3880*l.*; and that to the drawings and specification the corporate seal of the Company had been affixed, and that the plaintiffs had signed the same: the plaintiffs covenanted to complete the well, &c., and works mentioned and specified in the specification or shewn in the drawings, or which may be reasonably implied therefrom or be considered incidental thereto, of the materials and in manner and in all respects therein mentioned; and that they would find all materials required in the making and completing the works of such sort, &c., as in the specification described; and all scaffolding, engines, pumps, &c., mentioned in the specification, as required to be provided by the person contracting to perform the said work, as might be found necessary to complete the works, and labour, &c., necessary for the construction and completion of the well in a workmanlike manner, and in all respects conformable to the specification; and fully to complete the works in a workmanlike manner on or before the 22nd of September then next (with power to the engineer of the Company to delay the work and grant an extension of time if he should think proper). If not completed in manner aforesaid on the 22nd of September, the plaintiffs to be liable to a penalty of 20*l.* weekly. The defendants covenanted to pay the 3880*l.*, and such further sums as should be payable in respect of deviations from the works. The specification, which was under the seal of the Company, contained the following passage:—"The contractor will be required to sink the well, &c., to the depth of 120 feet, &c., after which the Company will undertake the erection of the permanent steam-engine and permit the pumping to be performed by it, sufficient interval of time being allowed for the erection of the steam-engine, and such time added to the period assigned to the contractor for the performance of the works.—*Held*, that there was an implied covenant on the part of the Company to erect the permanent steam-engine as provided in the specification.

and for any additions thereto after the rates specified in a schedule of prices : also reciting, that to the drawings and the specification the corporate seal of the Company had been annexed, and that the plaintiffs had signed the same : The plaintiffs covenanted, at their own costs and charges, to construct, and complete in a good, substantial and workmanlike manner the reservoir, well, shafts, tunnels and other works mentioned and specified in the said specification, or shewn in the said drawings, or which may be reasonably implied therefrom or be considered incidental thereto, and of the several and respective dimensions and of the materials and in manner in all respects therein mentioned, under the direction and to the satisfaction of the engineer of the Company for the time being ; and that they would at their costs and charges find and provide all and every the materials, and things required in the making, constructing and completing the said works, of such sort, quality, size and dimensions of their respective kinds, as in the said specification are more particularly described or referred to ; and all excavators, &c., and all scaffolding, shoring, tackle, engines, pumps, pipes, tools, utensils, fuel, candles, and other implements and things mentioned in the said specification, as required to be provided by the person contracting to perform the said work, or as may be found necessary to carry on and complete the said works ; and all workmanship and labour necessary and sufficient for the making, construction and completion of the said reservoir, wells, &c., hereby contracted to be made, constructed and completed, done and performed, in a good and workmanlike manner and in all respects conformable to the said specification and drawings hereinbefore mentioned and referred to, and signed by the said parties hereto, or as may be implied therefrom, or as is incidental thereto, to the satisfaction, &c., and fully complete and finish the same in a

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good and workmanlike manner on or before the 22nd day of September next ensuing the date of the indenture.—The deed provided, that if the engineer thought fit to delay the works he might do so, but that if not completed by the 22nd of September the plaintiffs should after that time be liable to a penalty of 20*l.* a week. The plaintiffs covenanted to observe, perform, and keep all and every of the conditions and stipulations mentioned in or at the foot of the *specification* that might not be covenanted to be done, or observed by any of the covenants in the *indenture*; and that the observance, performance and keeping of all such conditions and stipulations in or at the end of the *specification*, should be as binding by way of covenants and agreements as if they had been set out in the indenture. The defendants covenanted, that the plaintiffs observing and fulfilling the agreements and conditions in the *specification*, the defendants would pay the 3880*l.* and such further sums as should become payable in respect of any deviations from, alterations in, or additions to the said works, as shewn and specified in the drawings and *specification*, on receiving a certificate of the engineer, &c. (The declaration then set forth the *specification* which was under the seal of the Company. It contained the following passage as to the well and shafts:—) “The contractor will be required to sink the well, shafts and tunnels to the depth of 120 feet from the engine-house floor of the existing works, after which the Company will undertake the erection of the permanent steam-engine and permit the pumping to be performed by it, sufficient interval of time being allowed for the erection of the steam-engine, and such time added to the period assigned to the contractor for the performance of the works.” Breach: that though the plaintiffs sunk the well, shafts and tunnels, in the *specification* mentioned, to the depth of 120 feet, &c.; and though all conditions, and things,

happened, &c., to entitle the plaintiffs to the fulfilment, by the defendants, of the covenants in the specification mentioned to undertake the erection of the permanent steam-engine and to permit the pumping to be performed by it, and to entitle the plaintiffs to maintain this action for a breach of covenant: Yet the defendants neglected and delayed to undertake the erection of the said permanent steam-engine, or to permit the pumping to be performed by it, whereby, &c.

Demurrer and joinder therein.

Knowles (with whom was *T. Jones*), for the plaintiffs (*a*).—There is no express covenant by the defendants, in the deed, to provide the engine, but the deed and specification must be read together. The plaintiffs are to be paid a certain price on producing the certificate of the Company's engineers that certain work has been done. There is a penalty on their failure to complete the work within a certain time. The specification of the work which they contract to do, shews that the defendants were to erect a steam-engine and allow them the use of it to facilitate their operations. There is therefore an agreement on the part of the defendants to erect the steam-engine. If that were not so, they would have the power to defeat the claim of the plaintiffs, unless they went to the additional expence of erecting a steam-engine. The words of the specification are, "the Company will undertake the erection of the permanent steam-engine and permit the pumping to be performed by it." All the arrangements were made upon the supposition that when the plaintiffs got to a certain depth the Company would erect the engine. But it is said that there are no words of covenant to bind them to erect it. The deed,

(*a*) *Lush*, for defendants, began, but the Court called on the plaintiffs' counsel to support the affirmation.

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letting the work to the plaintiffs, is an implied covenant by the defendants that they will perform their part of the matters set down in the specification. The specification is incorporated with and is part of the deed. The seal of the Company has been affixed to it.

Lush, for the defendants.—The seal of the Company was affixed to the specification solely for the purpose of identifying it; the specification forms no part of the contract. Certain provisions in it were adopted and others omitted in the deed, which contain the agreement between the parties. It must be assumed that the plaintiffs undertook absolutely to raise the water by their own machinery, if necessary. [*Bramwell*, B.—The covenant is to do it in the manner mentioned in the specification. If the manner mentioned in the specification shews that the defendants are to do something, is not there a covenant by them to do it? *Pollock*, C. B.—If I covenant to build on your land and you accept it, is not that a covenant by you to let me build?] The plaintiff expressly agrees to find everything that may be necessary for completing the work. The agreements in the specification were at an end, those incorporated in the deed owe their efficacy to their being in the deed. *Rashleigh v. The South Eastern Railway Company* (a) shews that a covenant cannot be implied merely because it appears that the parties in making the contract took it for granted that a certain state of things would exist. [*Channell*, B.—That case afterwards went into error, when the Court entertained great doubt of its correctness and recommended the parties to compromise, which they did. *Martin*, B.—Here the deed contains a declaration under seal that the works mentioned in the specification are to be done by the respective parties. It is

(a) 10 C. B. 612.

very likely that the erection of the steam-engine was not a condition precedent to the plaintiffs' obligation to complete the works.]

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POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to judgment. It is admitted that there is no covenant, in express terms, contained in the deed; but wherever it is manifest from expressions in a deed, that the parties must have intended to stipulate that a particular thing should be done by either of them, there is an implied covenant to do it. The case of *Rashleigh v. The South Eastern Railway Company (a)*, is much in point, but we are informed by my brother Channell that when that case was argued in the Exchequer Chamber the Court intimated an opinion that they did not quite agree with the judgment of the Court below. That of course would make the case of doubtful authority. But in fact every case where a covenant is implied must stand upon its own foundation, and there is great difficulty in arguing from the analogy of other cases. The question always is, what is the reasonable conclusion to be drawn from all the matters to which the Court are entitled to look. Here, in the specification, I find this passage:—"The contractor will be required to sink the well &c. to the depth of one hundred and twenty feet, &c., after which the Company will undertake the erection of the permanent steam-engine and permit the pumping to be performed by it, sufficient interval of time being allowed for the erection of a steam-engine, and such time added to the time assigned to the contractor for the performance of the works." This therefore is part of the mode in which the entire work is to be performed, and the agreement that the work shall be done amounts to an implied contract that the Company will undertake and permit that the work

(a) 10 C. B. 612.

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shall be done in the manner specified. That is not controlled or over-ridden by the covenant that the contractors shall provide all the materials requisite for completing the works, which refers only to those things which according to the specification they were to do. It did not free the Company from the liability to erect the steam-engine which, according to the specification, they were bound to provide.

MARTIN, B.—I am of the same opinion. It is impossible to suppose that the parties meant to leave unprovided for so important a matter as the erection of this steam-engine. It was evidently intended that the steam-engine should be put up though it is difficult to make out the contract in words. Reading the instruments as simple writings, it is clear that when the work was in a certain state an engine was to be erected by the Company to relieve the contractors, and I should be astute to avoid a construction of the deed which would relieve the Company from the liability: the deed however recites that the "directors of the Company had determined to construct a reservoir, well, &c., and that the engineer of the Company had prepared the necessary drawings and made a general specification referring to the said drawings of all the works to be done and of the materials to be found and provided for that purpose; and that the plaintiffs had agreed with the directors of the Company to construct the said reservoir, &c., and to execute all the works particularized in the said specification, and which may be implied therefrom or be incidental thereto, and that to the drawings and the specification the corporate seal of the Company had been annexed." I think there is enough to shew that the Company did agree to provide the steam-engine as mentioned in the specification.

BRAMWELL, B.—I am of the same opinion. We have to find out what is the meaning of the parties to be collected from the language they have used. There is no covenant in express terms; therefore there arises some doubt. I agree with *Maule*, J., in the case cited, that where the parties have the power to express their intention in words, and do not express it, there is no covenant. Here, however, the intention of the parties is so expressed. The deed recites that a specification has been made shewing the work which was to be done, and that the plaintiffs had agreed to do it according to the specifications and drawings, and in the manner and in all respects therein mentioned. The mode of doing the work is, that the plaintiffs are to sink the well to a certain depth, and then the defendants are to provide an engine and give the defendants liberty to use it in pumping. That implies that the defendants were to provide the engine at a particular time, and therefore there is an implied covenant to provide it. It was argued that the deed shews that after the specification had been drawn the parties had come to a new agreement. To that I do not assent. I read every thing in the specification as part of the contract, except so far as the specification may be inconsistent with the deed. The covenant to do every thing necessary to complete the works, refers to things necessary to complete the works according to the specification. It is not inconsistent with the specification.

CHANNELL, B.—I am also of the same opinion. I think that the covenant is properly stated in the declaration, and that the meaning of the deed is that the specification is to be read with it. At the same time I quite agree with Mr. *Lush* in thinking that the deed would not incorporate any part of the specification which is repugnant to

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it. The plaintiffs covenant to do the work and provide the materials according to the specification. I think there is an implied covenant on the part of the defendants to provide the permanent steam-engine, and that the breach is well assigned.

Judgment for the plaintiffs (a).

(a) See *Brett v. Cumberland*, Cro. Jac. 522; *Duke of St. Albans v. Ellis*, 16 East. 352; *Anon.* March. R. 9.

May 6. MILLS v. J. E. HOLTON, J. GORHAM AND J. BARNARD.

A well was let from year to year, neither landlord nor tenant being bound to repair the steining. The well being out of repair the tenant complained to the defendants, the landlords, who sent in men to repair it. The well was destroyed by the negligence of the workmen employed. An action having been brought by the tenant to recover damages for the injury sustained by him. *Held*, that the defendants were not necessarily responsible, but that it was a question of fact for the jury what was the nature of the obligation incurred by them by reason of their interference.

THE declaration stated that the plaintiff was possessed of a well with water therein flowing, and of certain machinery and tackle belonging thereto; and that the defendants by themselves and their agents, by the negligent and improper use of machines and tools, and by the negligent and improper use of the said machinery and tackle, and by negligently throwing earth and other substances into the said well, injured the said well and the walls thereof, and choked and filled it up, &c.

Plea—Not guilty.

At the trial before *Pollock*, C. B., at the London sittings after last Hilary Term, it appeared that the plaintiff was the tenant of the well under a lease, dated the 26th of October, 1855, made by the defendants, who were the trustees of the Sheerness Waterworks. The demise was for one year, and so on from year to year, at the rate of 130*l.* a year. The lease contained a covenant by the

question of fact for the jury what was the nature of the obligation incurred by them by reason of their interference.

plaintiffs to keep the demised premises in repair, the steining of the well and damage by fire or tempest only excepted; and there was a proviso that in case of breach of any of the covenants, &c., on the part of the lessee to be performed, or if the well or spring of water should burst, become choked or discontinue to flow, and thereby become useless and irreparable, then it should be lawful for the lessor into the demised premises, or any part thereof in the name of the whole, to re-enter; with a further proviso, that it should be lawful for either party to determine the lease at the end of the first year, by giving three months' notice in writing. The lease did not contain any covenant by the lessor to repair. The plaintiff made a profit by selling the water. On the 7th of June, 1856, the water having become discoloured, the plaintiff complained to the company. After a meeting of the committee of the company, on the 10th of June, the defendant Gorham sent a person, named Howting, with workmen to put the well into repair. One of the workmen dropped a large cylinder into the well and damaged the sides of it; according to one witness he must have done it purposely. The defendant Gorham then dismissed Howting, and employed a person named Murray to survey the well, and afterwards directed him to take the necessary steps to put it in repair. Murray employed a steam-engine and pump to raise the water, the weight of which broke the well in completely. Upon these facts the defendants' counsel contended that the plaintiff ought to be nonsuited; that the defendants were under no obligation to repair, and that as an accident happened, while repairs were being done by them as volunteers, they were not liable. Certain minutes of meetings were put in, by which it appeared that Howting and Murray had been employed by the company, and that the defendants Barnard and Gorham were present at such meetings.

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The learned Judge told the jury that he was of opinion that the plaintiff was entitled to recover from the persons who had employed Howting and Murray. The jury found a verdict for the plaintiffs, leave being reserved to the defendants to move to enter a nonsuit if the Court should be of opinion that there was no evidence of the liability of the defendants.

Bovill having obtained a rule nisi accordingly.

Hawkins and *C. E. Pollock* now shewed cause.—The defendants took upon themselves to repair the well, and if by their negligence, or that of their workmen, injury was done to the plaintiff, they are responsible. It is true that they were under no obligation to repair, but if, as reversioners, they thought it worth their while to do so, they were bound to take due care that the work was properly done: *Coggs v. Bernard* (a). The defendants were not in the position of gratuitous bailees. After having undertaken the work, though the plaintiff might not have been able to compel them to complete it, the defendants became liable for any misfeasance: *Elsee v. Gatward* (b). Howting and Murray were the mere servants of the company and not independent contractors who had a right to do the work in any way they pleased; the defendants are therefore liable for their acts: *Sadler v. Henlock* (c). [*Martin*, B.—The question is whether the defendants really undertook to do the work properly. Workmen were sent by the defendants, the reversioners, to the premises of the plaintiff, who was their tenant, to do work which was for the mutual benefit of both parties. The plaintiff had an opportunity of seeing the men at work, and might, at any moment, have turned them off the premises if they were acting improperly. *Pollock*,

(a) *Ld. Raym.* 909; 1 *S. L. C.* 147.

(b) 5 *T. R.* 143.

(c) 4 *E. & B.* 570.

C. B.—At the trial I thought that the defendants did the work for their own benefit.]

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Bovill, Lush and Hannen, in support of the rule.—The action should have been brought against Howting and Murray, the persons employed to do the work, and not against the defendants: *Overton v. Freeman* (a), *Allen v. Hayward* (b), *Knight v. Fox* (c). The defendants being mandataries without reward, cannot be held liable except for their own gross negligence: Story on Bailments, s. 181. In *Shiells v. Blackburne* (d) a merchant undertook, voluntarily and without reward, to enter a parcel of goods, together with a parcel of his own of the same sort, at the Custom House for exportation, but made the entry under a wrong denomination, whereby both parcels were seized. Having taken the same care of the goods as of his own, not having received any reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken, it was held that he was not liable to an action for the loss occasioned to the owner of the goods. Here there was no proof of any undertaking on the part of the defendants to do the repairs properly, nor is the declaration framed on any such contract or undertaking. If a man who has broken his leg applies to a surgeon, who undertakes to set it gratis, the surgeon must use due skill. But that would not apply to a person who is not a surgeon. [Pollock, C. B.—If a man who is not a surgeon volunteers to set the leg, he engages that he has skill to do it; but suppose some of the main timbers of a house are affected by the dry rot, if the landlord who is not bound to repair sends in a builder, what obligation does he incur? Is it

(a) 11 C. B. 867.

(c) 5 Exch. 721.

(b) 7 Q. B. 960.

(d) 1 H. Bl. 158.

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not a question of fact? *Channell, B.*—If both landlord and tenant agree that a particular workman shall be employed, the landlord might not be liable for his acts, though it might be otherwise if the landlord sent in his own workmen.] Here the defendants were not in business themselves. In sending workmen, they therefore undertook to do no more than employ at their own costs persons whose business it was to do such work. *Wilson v. Brett (a)* shews that a person in the position of the defendants is only bound to exercise such skill as he possesses.

POLLOCK, C. B.—I am of opinion that there must be a new trial. The point raised by the plaintiff's counsel is new. The present is one of a class of cases requiring careful consideration. At nisi prius I was of opinion that there was some undertaking or obligation on the part of the defendants to do the work properly. It was left to the Court to say whether there was any principle to justify a nonsuit. But the extent of the undertaking was a question of fact, and it should have been left to the jury to say what was the nature of the interference of the defendants, whether it was purely gratuitous, or whether it created any undertaking or obligation; in other words, it is a question for the jury whether there was or was not any contract.

MARTIN, B.—I think that this is entirely a question of fact. The defendants may have made themselves absolutely responsible, or they may have merely done an act of kindness. In the latter case I cannot think that they would incur any responsibility.

BRAMWELL, B.—I also think that this is a mere question

(a) 11 M. & W. 113.

of fact. I doubt, however, whether the point is raised upon the present pleadings. But if they are amended I am inclined to think that the plaintiff will not be able to establish his case.

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CHANNELL, B., concurred.

Rule absolute for a new trial.

REIS and Another v. THE SCOTTISH EQUITABLE LIFE
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May 6.

RAYMOND had obtained a rule nisi to reply several matters.—The declaration was on a policy of assurance for 2000*l.* upon the life of Thomas Haire, subject to a condition that in case T. Haire should depart beyond the limits of Europe, all claim to any benefit out of or interest in the funds of the society should cease and determine, excepting always in so far as relief was provided, or might lawfully be granted by the directors of the said society, agreeably to the laws and regulations thereof; but that notwithstanding the above restriction Haire should be at liberty, without leave or extra premium, to visit Tangiers, or any other port within the Mediterranean, but that he was not to reside out of Europe at any place in the Mediterranean beyond the period of three months, or to go into the interior of Asia and Africa.” Plea.—That after the making of the policy T. Haire departed beyond the limits of Europe, otherwise than by visiting Tangiers, or any other port

To a declaration on a policy of insurance on the life of H., conditioned that if H. went out of Europe all claim to any interest in the funds of the society should cease, with a proviso that H. should be at liberty to visit Tangiers, or any other port within the Mediterranean; the defendants pleaded that H. departed beyond the limits of Europe otherwise than by visiting Tangiers or any other port within the Mediterranean. The Court

refused to allow the plaintiffs to plead as a replication on equitable grounds, that at the time of the making of the policy it was expressly stipulated that the policy should not be vitiated by reason that H. visited ports and places out of Europe; and that the plaintiffs entered into the policy on the terms of such stipulation.

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within the Mediterranean. To this plea the plaintiffs proposed to reply.—First, joinder of issue; Secondly,—as a replication on equitable grounds,—facts shewing that at the time of the making of the policy it was expressly stipulated by and between the plaintiffs and the defendants, that the policy should not be vitiated by reason that the said Thomas Haire carried on business at Gibraltar, or that he visited ports and places out of Europe, and that the plaintiffs entered into the policy on the terms of such stipulation: Thirdly, leave and licence by the defendants to Haire to depart beyond the limits of Europe.

Rex now shewed cause.—If the facts set out in the second replication are true, the plaintiff should have applied to a Court of equity to reform the contract: they shew that he never had a legal right. Therefore the matter cannot be replied by way of equitable answer to the plea: *Gulliver v. Gulliver* (a).

Raymond, in support of the rule.—*Wood v. Dwarries* (b) is an authority that the replication ought to be allowed. It was part of the real bargain that Haire should be at liberty to go to ports and places out of Europe. The defendant therefore pleads as a defence matter which, in equity, he would be precluded from setting up by a term of the contract not stated in the written instrument, and this Court may give equitable relief without the instrument being first reformed. That was the test applied by the Court in the case of *Luce v. Izod* (c). [*Bramwell*, B.—That was an application by the defendant for leave to plead an equitable plea. The parties had put into writing something which, in consequence of a mistake, did not embody the

(a) 1 H. & N. 174.

(b) 11 Exch. 493.

(c) 1 H. & N. 245.

real terms of the agreement between them; the plaintiff claimed in a Court of law a legal debt, and the defendant sought to avoid being driven into a Court of equity to defend himself. Here the plaintiff, having the power of choosing his tribunal, resorts to a Court of law of his own accord.] *Vorley v. Barrett* (a) shews that the agreement having been fully performed, it is not necessary for the plaintiff to go to a Court of equity for the purpose of reforming the agreement.

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POLLOCK, C. B.—I am of opinion that this rule, so far as it relates to the second replication, must be discharged. There is a plain distinction between *Wood v. Dwarris* and the present case. In *Hunter v. Gibbons* (b), which more nearly resembles this case, the Court decided that an equitable replication could not be allowed, where, if the whole matter had appeared in the declaration, the declaration would have been demurrable. The Courts will not allow a plaintiff to put himself, by an equitable replication, in a better position than he would have been in if the whole matter had been set out in the declaration. In *Wood v. Dwarris* the prospectus was part of the contract, and if the whole matter had been before the Court in the declaration it must have shewn that the plaintiff had a legal right.

MARTIN, B., BRAMWELL, B., and CHANNELL, B., concurred.

Rule discharged as to the second replication ;
 absolute as to the replication of leave
 and licence, defendant being at liberty
 to reply and demur.

(a) 1 C. B. N. S. 225.

(b) 1 H. & N. 459.

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May 2.

GIBBS and Others v. GREY and Others.

GREY and Others v. GIBBS and Others.

A cargo of guano was shipped from the Chinca Islands to London by the "Oriente." The "Oriente" having become disabled, put into Valparaiso, was condemned and her cargo taken out of her. The captain, "for account and risk of the owner of the cargo," chartered the "Fairy Queen" to take on "the cargo brought by the 'Oriente,' being 470 tons more or less, not exceeding what she can reasonably stow," at the rate of 5*l.* 2*s.* 6*d.* per ton. The owner of the cargo had an agent at Valparaiso of which the captains of the "Oriente" and the "Fairy Queen" were

THE cause of *Gibbs and Others v. Grey and Others* was tried at the London sittings after Michaelmas Term, 1855 when a verdict was taken for the plaintiffs, subject to special case, which was in substance as follows:—

In December, 1854, the agents of Messrs. Gibbs loaded at the Chinca Islands, on board a Spanish vessel called the "Oriente," which had been chartered by them, a cargo of guano, for which the captain signed bills of lading, the guano being deliverable in London. In January, 1855 the "Oriente" put into Valparaiso in a disabled state, the cargo was discharged into a hulk, and it became necessary to tranship and forward the cargo by another vessel.

On the 26th of March the captain of the "Oriente" entered into a charter-party with the captain of a vessel called the "Fairy Queen," of which the defendants Grey & Co. were owners. The charter-party purported to be between W. E. Woodward, master of the "Fairy Queen," of the burthen of 318 tons register, or thereabouts, of the one part, and Victoriano Colan, master of the "Oriente," "for account and risk of the owners of cargo of said vessel, or whomsoever it may concern," of the other part, and stipulated that the "Fairy

Queen" were aware, but no reference was made to him. After the guano had been loaded on board the "Fairy Queen," the captain of that vessel said that he had not more than 350 tons on board, and ultimately the captain of the "Oriente" agreed that freight should be paid on the full quantity of guano mentioned in the charter-party, and in order to carry out the agreement a bill of lading was signed by the captain of the "Fairy Queen," making the guano deliverable to M & Co. the agents for the general average settlement of the "Oriente" or their assigns, he or they paying freight for the guano as 470 tons, as per charter-party.—*Held*: First, that the master of the "Oriente" had no power to bind the owners of the cargo to pay the freight mentioned in the bill of lading. Secondly, that the charter-party contained no warranty that the cargo amounted to 470 tons more or less; and therefore the owners of the cargo were not liable under the charter-party for not loading a full cargo.

"Queen" should proceed alongside the hulk, and take on board therefrom "the cargo put on board thereof, and forming the cargo brought by the "Oriente," being 470 tons of guano, more or less, not exceeding what she can reasonably stow," &c., and therewith proceed to Cork for orders to proceed to any port in the United Kingdom, and there deliver her cargo at the expence of the charterers; and the captain of the "Oriente," as agent as aforesaid, agreed to load the vessel, and pay freight at the rate of 5*l.* 2*s.* 6*d.* per ton; and it was agreed that the captain of the "Fairy Queen" should sign the bill of lading with a clause of "weight and quality unknown," without reference to the rate of freight and without prejudice to the charter-party. The guano in the hulk was loaded on board the "Fairy Queen."

What further took place at Valparaiso appeared from the evidence of a Mr. Fox, the agent for the "Fairy Queen" at that place, and her captain. Mr. Fox stated the fact of the arrival of the "Oriente", that her cargo was loaded on board the hulk, and that she was condemned, and that afterwards the charter-party of the "Fairy Queen" was made, that before the charter-party was made several discussions took place between the captains of the "Oriente" and the "Fairy Queen" as to the quantity of guano brought by the "Oriente"; that the captain of the "Fairy Queen" expressed his fear that there was not a full cargo for the "Fairy Queen"; that the captain of the "Oriente" said, "there were fully 470 to 500 tons, more above than below that quantity," and wished to insist on the "Fairy Queen" taking 500 tons, which the captain of the "Fairy Queen" refused to consent to take; that the "Fairy Queen" was preferred by the captain of the "Oriente" to a small vessel called the "Annie Sanderson", on account of her greater size and

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capacity; that after the charter-party was made and the guano put on board the "Fairy Queen", the captain of the latter vessel insisted that he had not taken more than 350 tons on board; that the captain of the "Oriente" insisted that he had more, and that ultimately both parties went to the office of the Spanish Consul, the agent of the "Oriente," where it was agreed that freight should be paid on the full quantity of guano mentioned in the charter-party; and in order to carry out this agreement a bill of lading was signed by the captain of the "Fairy Queen" dated the 27th of April, 1855.

The bill of lading stated the loading of the guano on board in the usual way, to be delivered to Murrieta & Co., or the assignees, or they paying freight for the said guano as 47 tons, as per charter-party. Murrieta & Co. were the agents for the general average settlement of the "Oriente," and their name was suggested by Mr. Fox for the benefit of the captain of the "Fairy Queen" (a). The captain of the "Fairy Queen" was willing to fill up the ship with other cargo, but none could be obtained; and the captain of the "Oriente" urged his immediate sailing.

Upon the cross-examination of Mr. Fox it was proved that the plaintiffs had, to the knowledge of the captain of the "Oriente" and the witness, agents at Valparaiso, and that there was a house of Messrs. Gibbs & Co. there, and that no reference was made to them; that the "Oriente," being repaired, sailed from Valparaiso with a cargo, and that the loading of the "Fairy Queen" was finished at least three or four days before the bill of lading was signed, and that the agreement introduced in it was made after the loading was

(a) The witness Fox stated, that it is usual when a cargo is transhipped, for the bills of lading to be made payable to the agent of the vessel from which the goods are transhipped; the reason was stated to be that it gives some security with reference to the settlement of the average.

complete. On his re-examination he stated that the current rate of freight from Valparaiso to England, at the time of the making of the charter-party, was from 5*l.* to 5*l.* 5*s.*

The captain of the "Fairy Queen" was also examined, and the substance of his evidence was, that after he had taken on board all the guano supplied to him from the hulk he insisted that he had not more than 350 tons on board, and wanted 130 tons more; that the captain of the "Oriente" insisted that he had 470 tons, and that *then* the agreement was made that he should be paid freight as for 470 tons, and that on this understanding he signed the bill of lading. He further stated, that he was willing to load other cargo, and that on the 29th of April he received a letter from the captain of the "Oriente," urging him to sail at the earliest possible opportunity; that he did so, and arrived in London on the 4th of August following, having called at Cork for orders.

The plaintiffs procured the bill of lading of the guano to be indorsed to them by Messrs. Murrieta. The cargo loaded and delivered was 344 tons only; the plaintiffs offered to pay freight upon 344 tons at the rate of 5*l.* 2*s.* 6*d.* per ton, being the rate fixed by the charter-party; the defendants insisted upon being paid at that rate upon 470 tons, the quantity which might have been loaded on board, and which they alleged was payable according to the substituted agreement and the bill of lading. The result was a correspondence of some length, and ultimately by arrangement the plaintiff paid under protest a sum of 2388*l.* 13*s.* 9*d.*, being the freight of 5*l.* 2*s.* 6*d.* upon 470 tons, and exceeding by 645*l.* 15*s.* the freight payable on the actual quantity delivered at the same rate.

It was agreed that the Court should be at liberty to draw any inference of fact which they might think proper from the above statement.

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The question for the opinion of the Court is, whether the plaintiffs are entitled under the circumstances to recover the 645*l.* 15*s.*, as paid by them in excess of freight. If the opinion of the Court should be in the plaintiffs' favour then the verdict is to stand for 645*l.* 15*s.* If the opinion of the Court should be against the plaintiff, judgment of nonsuit is to be entered (a).

GREY and Others v. GIBBS and Others.

THIS was a cross action, brought by the defendants in the former action, to recover damages for the not providing a full cargo at Valparaiso under the charter-party of the "Fairy Queen." The case was stated for the opinion of the Court without pleadings, in pursuance of the order nisi prius in the former action. The facts are the same as in the former case, the evidence and proceedings in which may be referred for all the purposes of this case.

The question for the opinion of the Court is, whether the defendants in this action are liable upon the charter-party of the "Fairy Queen" for the neglect to provide a full cargo.

Cleasby (with whom was *W. H. Willes*), for Messrs Gibbs (b).—The master cannot make the owner of the cargo liable for the excess of freight on tonnage beyond the amount of the cargo. In *Shipton v. Thornton* (c) the power and duty of the captain of a disabled ship to make contracts for forwarding the cargo was much discussed. It appears that all the authorities agree that "the master is

(a) There was a second question, but as it related merely to not argued.

the costs of the pleadings, it was

(b) April 22.

(c) 9 A. & E. 314.

at liberty to procure another ship to transport the cargo to its place of destination." Lord *Denman*, in delivering the judgment of the Court, says, "It is clear that by the contract the shipowner (and the master as his agent) is bound to carry the goods to their destination, if not prevented from doing so in his own ship by some event which he has not occasioned, and over which he has no control. The master, says Lord *Tenterden*, in his Book on Shipping, part 3, c. 3, 8 b (a), "should always bear in mind that it is his duty to convey the cargo to the place of destination. This is the purpose for which he has been entrusted with it, and this purpose he is bound to accomplish by any reasonable and practicable method. When, however, such an event has occurred to interrupt the voyage, and the shipowner (or master, for we think no distinction can be made between the two) has no opportunity of consulting the freighter, there seems to be much disagreement in foreign ordinances and jurists as to whether he is bound to tranship, or whether, having contracted only to carry in his own ship, he is not absolved from further prosecution of the enterprise by the *vis major*, which prevents his accomplishing it in the literal terms of his undertaking. * * All authorities are, however, in unison to this extent, that the master is *at liberty* to procure another ship to transport the cargo to the place of destination; and in these words Lord *Tenterden* cautiously lays down the rule of our law." His Lordship then points out that the master may do so for the purpose of earning his full freight at the rates agreed on. That shews that in so doing he is acting as agent for the owner of the ship, and not at all as agent for the owner of the cargo. It is true that where the transhipment can only be effected at a rate higher than the original rate of freight, the case above cited shews that another principle may be introduced, viz., that

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of agency for the merchant. It is said that "it must not be forgotten that the master acts in a double capacity, agent of the owner as to the ship and freight, and as agent of the merchant as to the goods." In *Maude and Pollock on Shipping*, p. 75, it is said, the master has this authority while afloat or in a foreign port, *where there is no agent the shipper*. Here the master had no authority to act for the Messrs. Gibbs, because they had an agent at the port. It appears from the judgment of Sir Wm. Scott, in the case of *The Gratitude* (a), that though in some cases the master may have authority as agent for the owner of the cargo it is only in cases of instant and unforeseen and unprovided necessity that the character of agent and supercargo is forced upon him by the general policy of the law [Pollock, C. B.—Being an agent of necessity, his authority arises out of necessity and is limited by it.] *Duncan v. Benson* (b) shews that the owner of the goods cannot be made liable to contribute to any expenses, except such as constitute a general average. The master has in no case authority to bind the owner either of the ship or the goods if he can communicate with him: *Arthur v. Barton* (c), *Johns v. Simons* (d). A person who deals with the captain as agent for the owner does so at his peril. Thus if the master sells the cargo when there is no actual necessity for such sale, the purchaser is not protected: *Freeman v. The East India Company* (e). The goods are not liable to any charge beyond the amount of the freight.

Then, as to the cross-action, Messrs. Gibbs are not liable for not loading a cargo of 470 tons, because in the charter-party the quantity is not warranted to be 470 tons. Both

(a) 3 Rob. 258. See also *Benson v. Chapman*, 2 H. L. 720; 3 Exch. 644.
The Mercurius, 1 Rob. 84. (c) 6 M. & W. 138.
 (b) 1 Exch. 537. In error, (d) 2 Q. B. 425.
 (e) 5 B. & Ald. 617.

parties knew what the cargo was, and the description of the cargo as 470 tons is a mere falsa demonstratio.

Tomlinson (with whom was *M. Smith*), for Messrs. Grey. —The power of the master to bind the owner of the cargo by his contract arises out of necessity, but when the necessity has arisen the master has authority to do whatever is prudent and proper, and most conducive to the benefit of all concerned: *Abbott on Shipping*, part 4, c. 5, s. 3(a). The captain of the “*Oriente*” did what was best under the circumstances. The case expressly finds that “it became necessary to tranship and forward the cargo to its destination by another vessel;” and that “accordingly the captain entered into the charter-party.” It appears that the “*Fairy Queen*” was the only available vessel. The words “being 470 tons more or less” are a warranty. By the words “more or less,” the parties did not contemplate any considerable deficiency of cargo: *Cross v. Eglin* (b). The captain of the “*Fairy Queen*” would not have let his vessel unless he had a full cargo. No master would take in a short cargo of guano at the ordinary rate of freight, if he was bound to sail immediately. It was the same thing as if the captain of the “*Oriente*” had agreed to pay a gross sum as freight. [*Martin*, B.—Practically the owners of the cargo were to pay 7*l.* a ton instead of 5*l.* 2*s.* 6*d.*, the current rate of freight from that port.] The captain of the “*Oriente*” was at liberty to ship other cargo. Messrs. Gibbs had the benefit of the unoccupied space. By the subsequent arrangement Messrs. Gibbs obtained the benefit of the immediate departure of the vessel, by which they had the opportunity of being in time for a market in this country. It is not only the right, but the duty, of the master to tranship where the cargo is perishable. [*Martin*, B.—This was not a perishable

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(a) Page 303, 9th ed.

(b) 2 B. & Ad. 106.

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cargo in the sense in which fish or fruit is said to be so. It was liable to injury from weather. If the charter-party was reasonable, then the subsequent contract was reasonable, for the owner of the goods would have been liable for not filling up the vessel, and it was a prudent course of the captain to save him this responsibility, and for that purpose to give a lien on the cargo.

Cleasby, in reply.—If the description of the cargo of 470 tons was false to the knowledge of the master of the “*Oriente*,” the owner of the cargo is not responsible for that: *Story on Agency*, s. 69. The captain cannot bind the owners of the cargo by a charter-party, unless it is shewn that there were no other means of forwarding the cargo. *Barker v. Windle* (a) shews that the words “470 tons more or less” are not a warranty.

Cur. adv. vult.

The judgment of the Court in the above cases was not delivered by

POLLOCK, C. B.—(after stating the facts as above set forth).—On the argument all the authorities existing, or indeed as we believe bearing at all upon the question, were cited. The well known case of *The Gratitude* (b) and that of *Duncan v. Benson* (c) were fully referred to, but it was agreed by both the learned counsel that there was very little existing authority in English law upon the subject and that the case of *Shipton v. Thornton* (d) and a section of *Abbott on Shipping*, page 323, 6th edition (e), are the most material and the most directly bearing upon it.

(a) 6 E. & B. 675.

(b) 3 Rob. 240.

(c) 1 Exch. 537.

(d) 9 A. & E. 314.

(e) Part 4, c. 5, s. 3, page 301, 9th ed.

The question is one of great difficulty and has led to much difference of opinion amongst the most eminent foreign writers on jurisprudence; but it is more especially so in the law of England which regards with extreme jealousy the permitting any man to be bound by the contract or act of another, except where direct and express authority is given to him. In the present and similar cases, a merchant has loaded on board a ship a cargo upon a contract that it is to be conveyed in *that ship* from the port of loading to the port of discharge; and a provision is contained in the contract that the shipowner is to be excused from so doing if prevented by certain perils mentioned in it. A master is placed in command of the ship over whose appointment the merchant has no influence or control. One of the perils occurs in the course of the voyage which according to the contract excuses the shipowner from conveying the cargo further, but the master instead of acting upon it determines to forward the cargo by another ship, of which the merchant knows nothing, and in regard to which he has no opportunity of exercising any selection or choice. The question is, what contract, if any, the master can make obligatory upon the merchant in regard to the conveyance by the substituted ship when the merchant has an agent, or a house of business, to the knowledge of the master, at the intermediate port into which the ship has put in distress? Can he, without communication with them or giving them the option of receiving the cargo there, put it on board another ship and forward it to the port of discharge? We are not aware of any authority in the English law in which the master is said to have such powers. In *Shipton v. Thornton*, Lord Denman, in delivering the judgment of the Court, only put the case "where the shipowner or master has no opportunity of consulting the freighter;" and in the section in Abbott on Shipping before referred to, the learned

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author says: "The merchant should be consulted if possible" (a). In the present case the plaintiffs had an agent at Valparaiso, and indeed it would seem that a branch of the house carrying on business in the same name was established there; and it is stated in the case, that although all the parties knew this, no reference or communication whatever was made to them.

Again, has the master authority to contract that the merchant shall pay a rate of freight higher than that originally stipulated? In the present case the rate of freight by the "Oriente" is not stated, but we have no doubt that the rate of freight demanded and paid under protest, which was nearly 7*l.* per ton, was considerably higher than the original rate of freight by the "Oriente?" Again, has the master authority to bind the merchant by a charter-party, contracting not merely for the conveyance of the cargo but for dead freight, or is his authority confined to loading the goods on board the substituted ship under the ordinary contract by a bill of lading?

Many other difficulties will readily suggest themselves to any one who has considered the subject; but upon the question in the present case we are all of opinion that the master of the "Oriente" had not authority to bind the plaintiffs to pay the freight mentioned in the bill of lading. He had made a charter-party at the rate of 5*l.* 2*s.* 6*d.* per ton for freight, containing a stipulation as to the loading a full cargo. All the guano was put on board, and no more was forthcoming. The consequence was, that a right in the nature of a chose in action had arisen against the person who was bound by the charter. On this state of things we are of opinion that the master had not authority to substitute or create against the plaintiffs (assuming them to be liable on the charter) a lien upon the cargo in respect of this

(a) Part 4, c. 5, s. 3, p. 304, 9th ed.

chose in action, or in other words to create a lien for dead freight. We think that the plaintiffs are not shewn to be liable for anything beyond the freight mentioned in the charter-party, which was the current rate of freight at the time at Valparaiso, and are therefore entitled to recover back the further sum which they were compelled to pay under the circumstances mentioned in the case.

As to the case of *Grey and Others v. Gibbs and Others*, we are very strongly inclined to be of opinion that the master of a ship has not authority, under such circumstances as the present, to charter a ship and bind the merchant to provide a full cargo, or in other words, for the payment of dead freight. If he has such authority, what is the limit to it? Can he, when the goods of the merchant are sufficient to fill the ship to the extent of one-half or three-fourths capacity, enter into a contract obligatory upon the merchant to pay for the unoccupied space? It may be that the master of a disabled ship has power to send forward the cargo to the port of discharge by another ship, and upon that taking place which would be a performance of the contract if the original ship had arrived in safety, the master or owners may be entitled to the freight originally contracted for; the conveyance of the cargo by, and the right and true delivery from the substituted ship being deemed a substantial performance of the voyage, and equivalent to the conveyance by, and right and true delivery from the original ship. But we think in this case that all which by the charter-party was contracted to be loaded was the cargo of the "Oriente." The words of the charter-party are, "the cargo put on board the hulk, forming the cargo brought to Valparaiso by the "Oriente," being 470 tons of guano, more or less." It is clear from the charter-party itself, and proved beyond all doubt by the evidence, that the cargo was represented to be 470 tons at the least; but we do not think there

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is a warranty to this effect. If there be no warranty, the only liability which could exist would be for a false and fraudulent representation; this is not alleged to have been the case, for the statement of the captain of the "Oriente" is admitted to have been an honest one: but if it were not, the defendants, Messrs. Gibbs, would not be responsible for it. There is no authority or principle for holding that the owners of cargo are under such circumstances liable for a false and fraudulent representation by the master.

The result therefore is, that the verdict is to be entered for the plaintiffs in the first action for 645*l.* 15*s.*, with interest from the 18th of August, 1855, on the issue on the first count; and that as to other issues the jury be discharged; and as to the second action that the judgment be for the defendants.

Verdict to be entered for the plaintiffs
in the first action; for the de-
fendants in the second.



May 8.

GIBBS v. KNIGHTLY.

After a cause has been referred to arbitration by a Judge, under the 3rd section of the Common Law Procedure Act, 1854, the Court has power to amend the particulars of demand.

THIS cause had been referred to a master of this Court by a Judge's order made under the 3rd section of the Common Law Procedure Act, 1854. The parties having appeared by their counsel before the master, he thought that the particulars of demand should be amended, and suggested that the plaintiff should apply to a Judge at Chambers, to make the amendment. A summons having been taken out for that purpose, the parties appeared before *Channell, B.*, who desired that the application might be made to the Court.

Griffiths having now moved accordingly,

Raymond shewed cause in the first instance.—The Court has no power to amend the particulars of demand. In *Morgan v. Tarte* (a) it was decided, that where a cause is referred to arbitration without power of amendment a Judge has no power, except by the consent of the parties, to order the particulars of demand, specially indorsed on the writ, to be altered by increasing the amount of one of the items. That would be conclusive if this had been a reference by the consent of the parties. [*Pollock*, C. B.—The foundation of that decision is, that the parties having consented to one thing, the Court could not make them consent to another. My brother *Bramwell* suggests that the defendant might say—"Non hæc in fœdera veni."] The 7th section of the Common Law Procedure Act, 1854, provides that "the proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments as to the power of the arbitrator and of the Court, &c., as upon a reference made by consent," &c. A Judge has no power to direct a reference except under the statute, and subject to the limitations in the 7th section. It is clear that the master has no power to amend. [*Pollock*, C. B.—We might set aside the order of reference, and then, after making the amendment, refer the cause back to the arbitrator.] The amendment can only be made on payment of costs.

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POLLOCK, C. B.—We are all of opinion that the amendment ought to be made. The Master will dispose of the costs of the amendment and of this application.

MARTIN, B., concurred.

(a) 11 Exch. 82.

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BRAMWELL, B.—In the case cited, if an action had been brought on an award made after the amendment, the declaration must have alleged that the plaintiff and defendant mutually agreed to refer the matters in respect of which the award was made; but that allegation could not have been proved. Here there is no such difficulty.

CHANNELL, B., concurred.

Rule absolute.

May 4.

TAYLOR v. PEARSE.

In order to render a composition after bankruptcy, made under the 230th section of the Bankrupt Law Consolidation Act, 1849, and accepted by nine-tenths in number and value of the creditors, binding on those creditors who have not executed it, the offer of composition must be made to all the creditors, and not to those only who execute the deed.

Semble, that the offer must be of a composition by a money payment, and not by bills of exchange.

DECLARATION by indorsee against acceptor of a bill of exchange.

Plea.—That the defendant, a trader, had become bankrupt (setting out all the proceedings under his bankruptcy down to and including the last examination); that after such last examination all meetings, notices and things were held, given, done and existed necessary to entitle the defendant to call and hold the meeting hereinafter mentioned, and that thereupon afterwards, and after he had so passed his last examination, the defendant called a meeting of his creditors, &c., whereof, and of the purport whereof, twenty-one days' notice were given in the London Gazette, according to the true intent, &c., and such meeting was held at the time and place, and in all respects according to the said last mentioned notice: and that at such meeting the defendant, and one P. Pearse, then made an offer of composition within the true intent, &c., and offered and agreed to pay to the creditors of the defendant respectively, the sum of 3*s.* 6*d.* in the pound on the amount of their debts respectively, and nine-tenths in number and value of

the creditors, assembled at such last mentioned meeting, agreed to accept the same; that thereupon another meeting for the purpose of deciding upon such offer was appointed to be holden according to the provisions, &c., whereof notice was duly given, which second meeting was held at the time and place mentioned, and according to the said notice and the said statute; and that at such second meeting nine-tenths in number and value of the creditors then being present at such second meeting did also agree to accept such offer; that thereupon their acceptance of the said offer having been duly testified in writing, and all sums by the Court directed to be paid having been paid and discharged, the Court, upon the petition of the defendant, by its order made, &c., and sealed, &c., after reciting, &c. (setting out the petition of the defendant), did order that the petition for arrangement, filed by the defendant, should be dismissed, and that the adjudication of bankruptcy should be, and it thereby was, annulled; that the plaintiff remained the holder of the said bill of exchange during all the time the several proceedings in this plea were taken, and that all things have occurred necessary to render the said order valid and effectual, and to render the acceptance of the composition so agreed to, binding and obligatory upon the plaintiff: that the defendant and the said P. Pearse have, and each of them hath, always been ready and willing to pay to the plaintiff the said composition of 3*s.* 6*d.* in the pound on the amount of his claim, that the said composition thereon amounts to the sum of 17*l.* 10*s.* and no more, and the defendant now brings into Court here the said sum of 17*l.* 10*s.* ready to be paid to the plaintiff if he will accept the same.

Replication.—That the offer of composition was as follows:—“In the Court of Bankruptcy, in the matter of L. B. Pearse, a bankrupt. Offer of composition by P. Pearse and

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the bankrupt to the creditors, &c. Memorandum of agreement, made this 21st day of July, 1856, between P. Pearse of the first part, L. B. Pearse, the bankrupt, of the second part, and the several persons whose names are hereunder written of the third part, witnesseth that in consideration of the natural love and affection, &c., and for other considerations herein appearing, it is hereby mutually agreed, &c. First. P. Pearse and L. B. Pearse are, at their own expense, to take the necessary steps to procure the adjudication to be annulled, and the parties hereto of the third part are to sign any consent, petition or other document which may be required for that purpose on or before the 15th day of October next. Second. In case the adjudication be annulled on or before the 15th day of October next, P. Pearse is to pay to the parties hereto of the third part, on the 20th of October, a composition of 3s. 6d. in the pound upon the amount of the debts due to them respectively, which the persons hereto of the third part are respectively to accept in satisfaction of such debts. Third. P. Pearse and L. B. Pearse are, on or before the 14th of August, to deposit with the solicitor to the assignees, for the parties hereto of the third part the composition upon whose debts shall amount to 10*l*. and upwards, bills of exchange for the amount of the composition to be drawn by L. B. Pearse on and accepted by P. Pearse, payable to the said respective creditors or order on the 21st of October. In case the adjudication shall be annulled as aforesaid, the bills of exchange are to be delivered by the said solicitor to the parties hereto of the third part respectively, but in case the bankruptcy shall not be annulled as aforesaid, the bills of exchange are to be returned to P. Pearse. Fourth. If the bills of exchange shall not be so deposited, this agreement to be void. Fifth. The acceptance of the composition is to be subject to the pay-

ment and satisfaction by the said L. B. Pearse of all costs incurred by the assignees. As witness the hands, &c. L. B. Pearse, P. Pearse, S. Stevens."—That at the time of the offer of composition there were many creditors who were entitled to prove, and who had proved under the adjudication, &c., to wit forty creditors, whose debts amounted to 15,000*l.* and upwards; that only a small proportion in number or value agreed to accept the composition, that is to say, twelve creditors to the amount of 10,847*l.*; that no creditor who had proved, or was entitled to prove, his debt was personally present at the said meetings, or at either of them, though very many of them, creditors each of them to the amount of 50*l.* and upwards, were residing in England; that no such creditors appeared or voted at such meetings, or either of them, either personally or otherwise than by attorney, to wit John Atkinson; that the said adjudication was not annulled on or before the said 15th of October; that though the amount of the composition on the plaintiff's debt amounted to 10*l.* and upwards, neither P. Pearse nor the defendant deposited any bill of exchange for the amount of the composition, nor was any bill, nor the amount of the composition ever tendered, nor were P. Pearse or the defendant ever ready to pay the composition till long after the 21st of October.

The plaintiff also demurred to the plea.

The defendant demurred to the replication, and joined in demurrer to the plea.

Hugh Hill argued for the plaintiff.—The question arises under the 230th section of the Bankrupt Law Consolidation Act, 1849. The Court will not hold that the bankrupt is discharged unless he brings himself strictly within the words of this section, because the proceeding is one by which creditors may be deprived of their rights without

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their knowledge, unless they watch the announcements in the Gazette. First, there is no offer of composition to the creditors generally, but only to those creditors who execute the deed. [*Channell*, B.—That question was very much considered in the case of *Larpent v. Bibby* (a).] Secondly, P. Pearse was only bound to pay if the bankruptcy was annulled on or before the 15th of October; time therefore was of the essence of the contract. Thirdly. The agreement was to be void if bills were not deposited; that means void at the election of the creditors or any of them. The plaintiff had no means of getting his money under this offer of composition. [*Martin*, B.—Can nine-tenths of the creditors present at these meetings bind the rest to accept a composition paid by bills of exchange?] *Allcard v. Wesson* (b) shews how strictly the requisitions of the statute must be complied with in order to bar the rights of creditors.

J. Brown, contra.—The object of s. 230 is to enable a bankrupt after his bankruptcy to compound with his creditors. Here the fiat has been annulled by an act of the Court (c), and therefore the defendant has lost the protection of his bankruptcy. The legislature must be taken to have known that, in a majority of cases where there is a composition, part of the composition is paid in bills of exchange. It is not unreasonable that the resolution of so large a majority of the creditors present at two successive meetings should bind those creditors who do not take the trouble to attend, whatever be the arrangement they may choose to make. [*Bramwell*, B.—If this section is to be con-

(a) 5 H. L. 481.

(b) 7 Exch. 753. In error,
8 Exch. 260.

(c) It was stated by *Hugh Hill*

that the order had passed as a matter of form, and that the attention of the commissioner had not been called to it.

strued as providing that the commissioner upon payment of the composition shall annul the adjudication, it would be intelligible. The commissioner would examine the bankrupt as to the amount of his debts, and upon payment into Court of the composition upon such amount, would annul the adjudication.] The Act assumes that the creditors will take care of their own interests. The true meaning of the fourth clause of the agreement may be that it is to be voidable at the option of the parties to it. They have chosen to affirm it. A creditor who has not signed cannot avoid the agreement; he has no rights under it.

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POLLOCK, C. B.—We are of opinion that the plaintiff is entitled to judgment. In order to render an agreement to accept a composition binding upon all the creditors of a bankrupt under the 230th section of the Bankrupt Law Consolidation Act, 1849, the offer of composition must be made to all the creditors and not to those only who subscribe the deed.

MARTIN, B.—I am of the same opinion. The case of *Larpen v. Bibby* (a) is almost conclusive upon the point.

BRAMWELL, B.—I agree with the rest of the Court on this point. I think also that the section in question applies only where the offer is of a composition in money, and that creditors cannot be compelled to take bills of exchange without their consent.

CHANNELL, B., concurred.

Judgment for the plaintiff.

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April 29.

CHARLOTTE SHILLING, Administratrix of JAMES SHILLING
v. THE ACCIDENTAL DEATH INSURANCE COMPANY.

To an action, by the executrix of J. S., on a policy of insurance, by which the defendants agreed with J. S. to pay to his executors 2000*l.* on his death, the defendants pleaded that the policy was made by T. S. in the name of J. S., but for the use and benefit of T. S. and not for the use or on account of J. S.; that T. S. had not any interest in the life of J. S., and that the policy was a wagering policy contrary to the statute, whereby the policy was void. Held a good plea.

DECLARATION by the plaintiff, as administratrix of James Shilling, on a policy of insurance, by which the defendants, in consideration of 6*l.* 15*s.* paid to the Company by James Shilling, agreed with James Shilling that if he should suffer or receive any bodily injury from any accident or violence, on or before the 11th of June, 1857, that, subject to certain conditions, the capital of the Company should be liable to pay to the insured, his executors or administrators, in case the violence should cause his death, the sum of 2000*l.*, &c. ; and that while the policy remained in full force James Shilling was accidentally drowned, &c.

Plea.—That the said policy of insurance was in truth and in fact made and effected by one Thomas Shilling in the name and on the pretended behalf of the said James Shilling; but for the use, benefit and on account and behalf of the said Thomas Shilling himself, and not for the use, benefit or on account of the said James Shilling; and the said Thomas Shilling had not at the time of making the said policy, nor before nor at the death of the said James Shilling, any interest in the life of the said James Shilling, and that the said policy was a gaming or wagering policy contrary to the statute in such case made and provided, whereby the said policy was and is wholly null and void.

Demurrer and joinder therein.

Lush, in support of the demurrer.—A wife who procures her husband to insure his life may pay the premiums:

Reed v. The Royal Exchange Assurance Company (a). The object of the act is to prevent the making insurances on lives wherein the assured have no interest. The policy must be looked at to see who the assured is. Here it appears by the policy that James Shilling is the assured; and parol evidence is not admissible to shew that any one else is so. The plea is founded upon the second section of 14 Geo. 3, c. 48, which provides "that it shall not be lawful to make any policy or policies on the life or lives of any person, &c., without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote." [*Martin, B.*—The case seems very closely to resemble *Wainwright v. Bland* (b).] In that case Lord *Abinger's* ruling on this point at nisi prius was not confirmed by the Court on the motion for a new trial (c). The case went off upon another ground. In *Dalby v. The India and London Life Assurance Company* (d), *Parke, B.*, in delivering the judgment of the Court, points out that a contract to pay a fixed sum on the death of a person "would have been unquestionably legal at common law if the insurer had an interest therein or not." [*Pollock, C. B.*—I do not assent to that.] The second section of the statute in question applies only to policies effected by agents. Here the person legally interested is James Shilling, and his name appears on the face of the policy. He is the person to whom the money is payable, in other words the insured. It is consistent with this plea that there was an understanding between Thomas the son and James Shilling his father, that as the father's occupation was a hazardous one he should insure his life and the son should

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(a) Peake Add. Ca. 70.

(b) 1 Moo. & Rob. 481.

(c) 1 M. & W. 32.

(d) 15 C. B. 365. 387. See also *Cook v. Field*, 15 Q. B. 460.

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pay the premiums, and that the father should leave the sum insured to the son by his will. The plea should have gone on to aver that the policy was made without the knowledge or consent of James Shilling.

Raymond, who appeared in support of the plea, was not called on.

POLLOCK, C. B.—We are all of opinion that this is a good plea under the 14 Geo. 3, c. 48, s. 2. It avers the existence of a state of things which, if proved, would disentitle the plaintiff to recover. It appears that the policy was not in fact the policy of the person whose name appears on the face of it as being the person interested, or made for his benefit. It therefore comes within the prohibition contained in the second section of the act. There must be judgment for the defendants.

MARTIN, B.—I am of the same opinion. The obvious meaning of the plea is, that Thomas Shilling went to the office of the defendants, pretending that he was authorized by James Shilling to effect a policy on his account, when in fact he had no such authority, but really effected it for his own benefit. This is exactly what the statute was intended to prohibit, viz., that one man should effect a policy on the life of another not having an interest in such life. If the facts suggested by Mr. *Lush* are the true facts of this case, I think that the plea would not be proved, and that the policy would in effect be the policy of James Shilling.

BRAMWELL, B.—I am of the same opinion. This is a policy made on account of Thomas Shilling, who had no interest in the life of James Shilling. Mr. *Lush* says that

the defendant cannot plead that Thomas Shilling was the person interested. I think that is not so. Provision is made in the statute against any difficulty of that kind, by the enactment that it shall not be lawful to make any policy without inserting in such policy the name of the person "for whose use, benefit or on whose account such policy is so made." If the facts are as suggested by Mr. *Lush*, I agree with my brother *Martin* in thinking that the plea will not be proved.

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CHANNELL, B., concurred.

Judgment for the defendants.

W. A. LYNDON v. T. STANBRIDGE, Town Clerk of the
 Borough of BIRMINGHAM.

April 27.

CASE. The declaration stated that before and at the time of the committing of the grievances, &c., and after the making and passing of the Birmingham Improvement Act, 1851, and after the council of the borough had taken upon themselves, entered into and undertaken the several powers, duties and authorities in the said Act contained with respect to cleansing the streets in the borough, to wit, &c., the plaintiff was an inhabitant of the said borough,

Sections 87 to 98 of the Towns Improvement Clauses Act, 1847, are under the general heading, "and with respect to cleansing the streets." Section 87 enacts (inter alia), "that the commissioners shall cause all the

dust, ashes and rubbish to be carried away from the houses and tenements of the inhabitants of the town or district within the limits of the special Act at convenient hours and times." Section 50 of the Birmingham Improvement Act, 1851, enacts, "that, subject to the provision thereafter contained the clauses of the Towns Improvement Clauses Act, 1847, with respect to cleansing the streets, shall be incorporated with and form part of this Act." By the 57th section of the same Act, "the several clauses of the Towns Improvement Clauses Act, 1847, numbered respectively 87, &c., shall not extend to any lands used as arable, meadow, or pasture ground only, or to wood lands or market gardens, garden allotments or nursery grounds, or to any buildings or deposit on such lands, or to any roads or footways intersecting the same respectively." *Held*, that under these sections the commissioners were not compellable to remove from a manufactory, dust, ashes and rubbish arising from the combustion of coal, and otherwise in the course of the manufacture of edge tools within the borough.

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and was the occupier of certain houses or tenements, called the Minerva Works, in the said borough, and whilst the plaintiff continued to be such inhabitant and occupier to wit, &c., divers large quantities of dust, ashes and rubbish had accumulated at the said works of the plaintiff within the said borough, and within the limits of the said act of parliament, the said dust, ashes and rubbish not having been kept or required for the purpose of manure, of all which several premises the said council then had notice. And the plaintiff then, by a certain notice in writing, requested the council to cause the said dust, ashes and rubbish so accumulated at the works of the plaintiff to be carried away and removed from the same, and although a reasonable time had elapsed, nevertheless the council knowingly, wrongfully and wilfully, and in violation of the duty imposed upon them by the said act of parliament, suffered the dust, ashes and rubbish to remain and be accumulated in, upon and about the works of the plaintiff, and wholly refused to carry away and remove the same, the same then being a nuisance to the plaintiff, whereby, &c.

Plea.—That before and at the time when, &c., the plaintiff was possessed of a manufactory and works, to wit the Minerva Works in the declaration mentioned, in and upon which he carried on a manufacture, to wit the manufacture of spades and edge tools, and in the course and for the purpose of which manufacture he had theretofore used large quantities of coal, slack and other combustible materials, and which in the course and for the purpose of which said manufacture he had caused to be converted into ashes, dust and rubbish, and had also, otherwise, in the course of and for the purposes of the said manufacture, made and produced large quantities of other dust, ashes and rubbish, and all which said dust, ashes and rubbish he had, before the committing of the said grievances,

allowed and suffered to accumulate upon the said works; that the plaintiff was not at the same time an inhabitant of the said works, and that the said works are the houses and tenements, and the said dust, ashes and rubbish are the dust, ashes and rubbish in the declaration mentioned.

Replication.—That the plaintiff was an inhabitant of the said works by using and occupying a certain dwelling-house therein and parcel thereof in the day time, for the purpose of having his meals prepared and eating the same therein, and by using and occupying the said dwelling-house by one William Thornton, his servant, who resided therein, together with his family, as servant of the plaintiff, and by using and occupying the said works and certain offices, counting-houses and shops therein and parcel thereof for the purposes of his said trade and manufacture.

The plaintiff also demurred to the plea. The defendant demurred to the replication. Joinder in demurrer.

Montague Smith (with whom were *J. A. Russell* and *J. P. Norman*), for the plaintiff.—The Birmingham Improvement Act, 1851 (*a*), by s. 50, provides that the Towns Improvement Clauses Act, 1847 (*b*), with respect to cleansing the streets, shall be incorporated with and form part of that Act. The 87th section of the latter Act enacts, “that the commissioners” who by the third section of the former Act are to be the council of the borough “shall cause all the dust, ashes and rubbish to be carried away from the houses and tenements of the inhabitants of the town or district, within the limits of the special Act, at convenient hours and times. It is submitted that the dust, ashes and rubbish mentioned in the plea are such as the council were bound to remove under this section. The place in which they were accumulated was a tenement. The object of the clauses in

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(*b*) 10 & 11 Vict. c. 34.

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question, in the Towns Improvement Clauses Act, is to make provision for the removal of all the dust, ashes and rubbish made in the towns to which the Act is to be applied. The words in the 90th section are, "that the dust, ashes and rubbish which the commissioners shall cause to be collected and carried away from the houses or elsewhere within the limits shall be the property of the commissioners." By the 92nd section the commissioners may require the occupiers of houses or tenements to deposit their dust in convenient places to be provided. The 95th section empowers the commissioners to appoint scavengers for removing dust, ashes, rubbish and filth from the streets and from the houses or tenements therein. The 96th section enacts, that every occupier of any building or land who refuses to permit scavengers to remove dirt, ashes, or rubbish shall be liable to a penalty. It is evident from a comparison of these sections that the word tenement is used in a very large sense. The 57th section of the Birmingham Improvement Act, 1851, provides that "the several clauses of the Towns Improvement Clauses Act, numbered 90, 92, 95 and 96, &c., shall not extend to any lands used as arable, meadow or pasture land only, or to woodlands, market gardens, garden allotments or nursery grounds, or to any buildings or deposit on such lands." That exception shews what is the sense in which the word tenement is used in section 87; "Exceptio probat regulam." Section 32 of the Birmingham Improvement Act speaks of a factory under the general term "house." Under the 57 Geo. 3, c. xxix., ss. 59, 60, which is the Act in force in London on this subject, two cases have occurred in which doubt appears to have been entertained as to the right and duty of the scavengers to remove dust, ashes and rubbish from manufactories. In *Filbey v. Combe* (a) it was held

(a) 2 M. & W. 677.

that the scavengers were not entitled to the partially consumed ashes of a brewhouse, which the brewer was in the habit of using for heating water to cleanse his casks. In *Law v. Dodd* (a) it was held that they were not entitled to the refuse from the ash pit of a brass founder, which he was in the habit of giving to his apprentices, who sold it to the brass refiners, such refuse containing some brass, and being of some commercial value.—Then it is said that the plaintiff was not an inhabitant. The word inhabitant may mean a person residing within the borough, or it may mean an occupier: *Rex v. Hall* (b). Here the context clearly shews that the word is used in the sense of occupier. The proviso at the end of the 87th section is that the “occupier” may keep soil, &c., made on his own premises, so as not to be a nuisance. Sections 92 and 96 are in favour of this construction. Many houses are not used as residences, and yet it is clear that the enactment must have been intended to benefit the occupiers of such places.

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Sir F. Thesiger (with whom were *Macaulay, Hayes, Serjt., and Field*), for the defendants.—The word tenement is not used in the large sense contended for by the plaintiff. [*Martin, B.*—It may have been inserted for the purpose of including the yard or garden usually occupied with a dwelling-house.] It is a rule of construction that, where general words occur in an act of parliament after others of a more limited construction they shall be taken not to extend beyond the words which precede them. The word may be used in the sense of small dwelling-houses: *Rex v. Manchester and Salford Waterworks Company* (c), *Rex v. Moseley* (d). The 96th section does not

(a) 1 Exch. 845.

11 Exch. 1.

(b) He referred also to *Taylor*

(c) 1 B. & C. 630.

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(d) 2 B. & C. 226.

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extend the operation of the 87th. The word "land," in the 96th section, may relate to the footways mentioned in the 88th section. The present question was not raised in *Filbey v. Combe* (a) or *Law v. Dodd* (b). [Martin, B.—Section 100 seems to be the provision regulating the removal of filth from gardens and other like places.] The plaintiff was not an inhabitant or occupier within the meaning of the Act: *Rex v. Adlard* (c), *Rex v. The Inhabitants of North Curry* (d).

Montague Smith in reply.—For the sake of public convenience these clauses were enacted to secure the removal of all rubbish from places near to which persons might reside or be employed. Merely to provide for the removal of dust from dwelling-houses would not have been sufficient for that purpose. Section 100 provides for the removal of dung retained by the occupiers of houses and tenements under the proviso in section 87. If these clauses applied to dwelling-houses only, the exception in the 57th section of the Birmingham Act would have no meaning.

POLLOCK, C. B.—I am of opinion that there must be judgment for the defendant both on the plea and replication. The plaintiff contends that the commissioners are bound to remove the dust, ashes and rubbish from his works. The substance of the defendant's plea is, that the place was a manufactory of spades, and that in the process of manufacture large quantities of coal and slack were converted into dust, ashes and rubbish; that no part of such rubbish arose from domestic occupation, and that by the 87th and following sections of the Towns Improvement Clauses Act the commissioners are not bound to remove

(a) 2 M. & W. 677.

(b) 1 Exch. 845.

(c) 4 B. & C. 772.

(d) 4 B. & C. 953.

the rubbish of manufactories, but only domestic rubbish. We are of opinion that this plea is good. The replication is that the plaintiff was an inhabitant of the works, that his servant lived there, and that the plaintiff had his meals there, and therefore he had a right to have the rubbish removed. The replication is clearly bad. It involves the same question as the plea, but puts the right of the plaintiff upon the ground that because the plaintiff is an inhabitant therefore he is entitled to have all his rubbish carried away. We must put a reasonable construction upon this act of parliament. We are not bound to give to the word "tenements" the large construction contended for on behalf of the plaintiff. Apart from the case of *Rex v. The Manchester Waterworks Company (a)*, which was cited to shew that the word may be used in a limited sense, it is a general rule of construction that, where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters ejusdem generis with such class. Thus, the words "boat, barge or other vessel" in an act of parliament have been held not to include ships, which are vessels not ejusdem generis with boats and barges (b). Here it would be unreasonable to construe the word tenements in the larger sense. Mr. Smith says that we exclude cases where persons exercising certain trades create more dust and ashes than would necessarily be created by domestic occupation. But it is clear that the commissioners are not bound to remove all possible rubbish. My brother Bramwell suggested, that if a person were to pull down his house the commissioners would not be bound to remove the rubbish he would create. So if a man were to dig a well, or sink a mine, he would throw

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(a) 1 B. & C. 630.

(b) And see *Evans* q. t. v. *Stevens*, 4 T. R. 224.

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up a vast quantity of rubbish, the removal of which was clearly not contemplated. Though we hold that the commissioners are not bound to remove manufacturing rubbish, it does not follow that they would not be bound to remove the ashes of a fire ordinarily used for domestic purposes, if it was occasionally used for trade purposes. Here it is clear that the bulk of the rubbish arose from the fires used for the manufacture of the spades and edge tools. If there was any domestic rubbish the plaintiff should have new assigned. If the legislature had intended that the rubbish from manufactories should be removed by the commissioners, they would have used words larger than "dust, ashes and rubbish." A meaning may be given to the word "tenements" by construing it as applying to cellars, the letting of which as habitations is regulated by the 114th section of the Towns Improvement Clauses Act. I do not say that the clause does not apply to *any* manufactory. Part of a manufactory may be used as a dwelling-place. The commissioners may be bound to remove the dust arising from such occupation, and ashes of the fires used for cooking the victuals of the inmates. If a domestic fire were occasionally used for manufacturing purposes, though the quantity of dust and ashes might be somewhat increased, that would probably not affect the obligation of the commissioners to remove the ashes. The principle "*de minimis non curat lex*" would apply in such a case. But it is clear that the commissioners are not bound to assist manufacturers in carrying on their works.

MARTIN, B.—I am of the same opinion. Assuming the declaration to be sufficient, as at present I think it is, the plea appears to me to answer it. The averment that the plaintiff was not an inhabitant of the works is immaterial. It appears that the dust, ashes and rubbish were entirely produced by the

consumption of coal and slack in the manufactory. This rubbish was not likely to become injurious to health, but was only a mound of inoffensive refuse. I think, therefore, that the commissioners were not bound to remove it. The dust, ashes and rubbish which they are bound to remove are such as arise from house occupation—such as if allowed to remain would be likely to become a nuisance. The heading of the clauses relating to this matter in the Towns Improvement Clauses Act, 1847, is “And with respect to cleansing the streets.” Reading that with the preamble it shews that the object of these clauses was the enforcing of measures relating to the cleansing of the town, and making it wholesome for the inhabitants. Looking at the 100th section I am confirmed in that impression. In the 97th section there is a penalty on persons other than the commissioners removing any “night soil, dust, ashes, rubbish or filth;” that shews what is the kind of rubbish intended to be removed. The 96th section was referred to by Mr. *Smith*, but it merely imposes a penalty on persons obstructing the scavengers in removing such dirt, ashes and rubbish *as they are authorized to do*. I think, however, that the occupation of a manufactory by a person not residing in the town would be a sufficient inhabitancy to entitle the owner to have his dust removed, if the dust was such as the commissioners were bound to remove. The servant may have been a mere gatekeeper. But if the plea is good the replication affords no answer to it.

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BRAMWELL, B.—I am of the same opinion. I think that the plea would be good without the allegation that the plaintiff was not an inhabitant of the works. The expression in the 87th section, “houses and tenements of the inhabitants of the town or district,” cannot mean that persons who reside in the town shall be entitled to have their

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dust and ashes removed from tenements which may be at ten miles distance from the town. The expression, therefore, may be taken to indicate the quality of the houses or tenements. Putting a rational interpretation upon this clause, it is a regulation not with respect to persons who inhabit the town, but with respect to tenements within it which may be inhabited. The words comprehend any description of tenement which is capable of being inhabited within the district, such as manufactories and the like. The plaintiff is a person to whom, and his manufactory is a tenement to which, this clause applies. The only remaining question is, whether the act relates to dust, ashes and rubbish of the description mentioned in the plea. I should be reluctant to put a qualification upon words upon any notion that the legislature meant something which it did not express. But we are constantly compelled to put a qualified construction upon general words, and it seems to be necessary to do so here. It is impossible to suppose that the commissioners are bound to remove such rubbish as would arise from gas works, the digging of a well, or the pulling down of a house; and the rubbish arising from the fires in a manufactory appears to me to be of the same character. "Dust, ashes and rubbish" must, therefore, be taken to be used in a limited sense, and to mean what may be called house, occupation, inhabitancy, or domestic rubbish. Here the dust, ashes and rubbish were not the dust, ashes or rubbish arising from inhabitancy, and on that ground I am of opinion that the plea is good. I think that it would be good without the last allegation, and, therefore, the replication is bad. No objection has been taken on that ground, but I doubt whether the declaration is not demurrable.

CHANNELL, B.—I am of the same opinion, although I

should have been better satisfied if we had taken time to consider. I doubt if the action is maintainable. If, however, any action lies, the declaration sets forth facts which raise a presumption that the dust in question was within the Act. That is answered by the plea, which shews that this dust, ashes and rubbish was not such as the plaintiff could compel the commissioners to remove. The replication is merely a circuitous traverse of an immaterial allegation in the plea.

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Judgment for the defendant.

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May 8.

*D*ASENT had obtained a rule nisi to set aside the award made herein, on the grounds that it was not final, and that the arbitrators had no power to order a discontinuance.—The order of reference provided that the action should be “referred to the award, order, arbitrament, final end and determination of twelve parties, six to be named by each party to the action, or in the event of their not agreeing, to an umpire to be named by the arbitrators.” The costs of the cause and of the reference and award to abide the event of the award, and it was ordered “that in the event of either of the parties disputing the validity of the award, or moving the Court to set the same aside, the Court shall have power to remit the matters hereby referred, or any or either of them, to the reconsideration of the said twelve parties or umpire. And that in the event of any of the said parties declining to act, or

By an order of reference an action was referred to the award of twelve persons, six to be named by each party to the action; and it was ordered that in the event of either of the parties disputing the validity of the award, &c., the Court should have power to remit the matters thereby referred or any of them to the reconsideration of the said twelve persons; and in the event of either of the said parties declining to

act, or dying before they or he should have made their or his award, the parties might, or if they could not agree, one of the Barons of the Court might appoint fresh arbitrators. After the arbitrators had made an award one of the twelve died. On motion to set aside the award, which was admitted to be bad, *Held*, that the Court had power to remit back the matters referred, to the surviving eleven and a fresh arbitrator to be appointed in pursuance of the power in the submission.

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dying before they or he shall have made their or his award, the said parties may, or if they cannot agree one of the Barons of the Court of Exchequer may, on application by either side appoint such arbitrator or umpire." The twelve arbitrators having been nominated, made an award directing that the action should be discontinued and stayed, and that each of the said parties thereto should pay his own costs of the said action and of the reference. One of the arbitrators had died since the making of this award.

Lush shewed cause.—It must be admitted that the award cannot be sustained, because it contains nothing to prevent the bringing of a fresh action. But as the award is a nullity, it may be referred back to the eleven surviving arbitrators and such new one as may be appointed in pursuance of the power contained in the submission. The cause is referred to the award of the arbitrators, and the words "dying before they or he shall have made their or his award" refer to the final award; that award which the arbitrators have power to make.

Dasent, in support of the rule.—The award must be set aside. The power to appoint a new arbitrator only applies when no award has been made in fact. The arbitrators having made an award, cannot make another, because, though bad, it is still their award; therefore the power does not apply in the present case. It was never contemplated that the award should be referred back to persons other than those who made the original award.

POLLOCK, C. B.—I am of opinion that Mr. *Lush's* argument is well founded. The clause providing for the appointment of a new arbitrator in the event of either of the parties "dying before they or he shall have made their or his award" comes immediately after the provision, that

"in the event of either of the parties disputing the validity of the award, or moving the Court to set the same aside, the Court shall have power to remit the matters thereby referred, or any or either of them, to the said twelve parties or umpire." The meaning is, that the arbitrators are to make a final end of the matter in dispute; if there is any defect in the award it is to be sent back, and if before the final settlement either of the arbitrators should die there is a provision for appointing a new one. The rule must be absolute to remit the cause to the eleven surviving arbitrators, and a new arbitrator to be appointed by the parties, or by one of the Barons of the Court in the event of the parties not agreeing in the selection.

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MARTIN, B., BRAMWELL, B., and CHANNELL, B., concurred.

Rule accordingly.

SHARPLES and Others v. RICKARD.

May 8.

DECLARATION that defendant at Quebec, in Canada, by his bill of exchange now overdue, required C. Jones to pay to the order of C. and J. Sharples in London 304*l*. thirty days after sight; that C. and J. Sharples indorsed the bill to the plaintiffs; that the bill was duly presented for acceptance and dishonoured, &c.

Pleas.—First: that the bill of exchange in the declaration mentioned was not duly presented for acceptance

A bill drawn and indorsed at Quebec was transmitted by post to the indorsee at Liverpool, and presented by him to the drawee, who resided in England, for acceptance. *Held*, that the 17 & 18 Vict.

c. 83, did not render it necessary for the indorsee to affix a stamp on such bill before presenting it for acceptance.

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and dishonoured: Secondly, that the defendant had not due notice of the dishonour of the said bill; whereupon issue was joined.

At the trial before *Crowder, J.*, at the last Gloucestershire Assizes it appeared that the bill was indorsed by Messrs. C. and J. Sharples & Co. of Quebec, and forwarded by them in a letter to the plaintiffs, merchants at Liverpool, who presented it for acceptance to the drawee, who resided at Gloucester. When produced, the bill was unstamped. It was objected on the part of the defendant that, by the 17 & 18 Vict. c. 83, an adhesive stamp should have been affixed to it. The learned Judge being of that opinion, and considering that the first plea made it incumbent on the plaintiff to produce the bill, the plaintiff was nonsuited.

Keating had obtained a rule nisi to set aside the nonsuit, and for a new trial, on the grounds that upon the pleadings it was not necessary to produce the bill, and that no stamp was required.

J. J. Powell now shewed cause.—First, whether it was necessary to produce the bill or not; it was voluntarily put in at the trial. Then it appeared that nothing had been presented but an unstamped piece of paper. Secondly, the bill required a stamp. The 17 & 18 Vict. c. 83, s. 3, sched., imposes on foreign bills of exchange drawn out of the United Kingdom, and payable within the United Kingdom, the same duty as on an inland bill of the same tenor and date. Section 5 provides that “the holder of any bill of exchange drawn out of the United Kingdom, and not having a proper adhesive stamp affixed thereon, as therein directed, shall, before he shall present the same for payment, or indorse, transfer, or in any manner nego-

tiate such bill, affix thereon a proper adhesive stamp, for denoting the duty by such Act charged on such bill." Here, though the bill had been presented, it had no stamp. [*Pollock*, C. B.—There may be a distinction between presenting a bill for acceptance only, and presenting it for payment. *Martin*, B.—A bill drawn and indorsed abroad does not require a stamp merely because it is sent here for acceptance.] The indorsement or transfer was not completed until the bill had been received by the plaintiffs in this country. The mere writing of the name of the indorser on the back of the bill abroad was not enough to constitute a complete indorsement of the bill. It does not appear but that the drawers may have written the indorsement on the bill in this country.

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Keating and *Gray* appeared to support the rule, but were not called on.

POLLOCK, C. B.—This was an application to set aside a nonsuit, which proceeded on the ground that the bill on which the action was brought was unstamped when produced at the trial. *Mr. Powell* argued that the bill required a stamp because it had been negotiated in this country. The facts appear to have been, that the bill was indorsed by Messrs. C. and J. Sharples, who resided at Quebec. If, in fact, the bill had been indorsed by them in this country, it was for the defendant to have shewn that, in order to raise the objection that a stamp was requisite. But no such evidence was adduced. The arrival of the letter from Quebec, and the receipt of the bill by the plaintiffs, at Liverpool, did not amount to a negotiation of the bill in this country. The Act does not require a bill to be stamped before it is presented for acceptance. Indeed I believe that the Act was expressly framed to exclude the necessity of stamping a foreign bill

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before it has been accepted by the drawee here, unless it has been indorsed or negotiated in this country.

MARTIN, B.—I am clearly of opinion that this nonsuit must be set aside. I am not by any means satisfied that it was necessary to produce the bill of exchange at the trial. In the case of *Chaplin v. Levy (a)*, under circumstances somewhat analogous to those of the present case, it was held unnecessary to produce the bill. However I give no opinion on that point. As to the stamp, the 3rd section of 17 & 18 Vict. c. 83, provides that the duties by that Act “granted in respect of bills of exchange drawn out of the United Kingdom, shall attach and be payable upon all such bills as shall be paid, indorsed, transferred or otherwise negotiated within the United Kingdom wheresoever the same may be payable.” The Act does not provide for the case of a bill merely sent here to be presented for acceptance. The legislature affixes a stamp only when there is a contract in this country. I think, therefore, that it never became necessary to affix the adhesive stamp to the bill of exchange on which this action was brought.

BRAMWELL, B.—I am of the same opinion. There was no evidence that this bill was indorsed in England. The payees at Quebec having indorsed the bill there and sent it to England, the indorsement was in law an indorsement where the payees resided: *Gibbs v. Fremont (b)*, *Allen v. Kemble (c)*. Then, treating the indorsement as made at Quebec, the statute does not apply. I do not know whether it was reasonable to incumber foreign bills with a stamp duty, but it would be highly unreasonable to make foreigners suffer for not affixing stamps of which they know nothing, and which they might not be able to

(a) 9 Exch. 531.

(b) 9 Exch. 25.

(c) 6 Moo. P. C. 314.

procure out of this country. Where however a bill is indorsed in England so that the indorsement is an English contract, or where it is presented for payment in England, it is a different matter. It was never meant if a Frenchman draws a bill in Paris to be sent to his correspondent in London to be presented there, that a stamp is to be put on the bill before it comes to this country.

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CHANNELL, B.—I also think that the rule must be absolute. I am not satisfied that it was necessary to produce the bill. However that may be, there is nothing to shew that the bill required a stamp. The duty is not imposed on all foreign bills. It was argued that the bill was indorsed in this country, but that is a fallacy. The bill was drawn abroad payable not to the drawer's order, but to C. and J. Sharples in London. It cannot be presumed that it was indorsed in London, because it was made payable in London. Then the receiving of the bill by the plaintiffs at Liverpool, is not a transfer or negotiation here. Therefore the bill was neither paid, indorsed, transferred or negotiated in this country.

Rule absolute.

1857.

April 22.

**CLEMENTS and Others, Assignees of PHILLIPS, a
Bankrupt, v. M'KIBBEN.**

A trader bought goods to be paid for by bill. A few days after the goods had been delivered the seller called and demanded a return of his goods, and at the same time threatened to have the trader arrested for swindling in taking in the goods when he knew he was in insolvent circumstances. He requested to see the trader who refused to see him. *Held* not sufficient to raise a presumption of a "beginning to keep house with intent to delay a creditor" so as to constitute an act of bankruptcy within the 67th section of the Bankrupt Law Consolidation Act.

THIS was a special case stated for the opinion of the Court without pleadings.—

The action was brought by the plaintiffs as assignees of one Phillips, a bankrupt, to recover 98*l.*, the value of twenty tierces of beef sold by the defendant, a provision merchant at Liverpool, to Phillips, to be paid for by a bill to be drawn by the defendant and accepted by him. The beef was redelivered to the defendant under the following circumstances. Phillips received the beef at Cardiff on the 9th of April. On the 12th of April he had a meeting with some of his creditors, when he declared that he was unable to meet his engagements, and had consulted his solicitors on his affairs, who had advised his becoming a bankrupt. On the 14th he caused circulars to be sent to the defendant and his other creditors, convening a meeting of his creditors for the 25th of April. On the same 14th of April the defendant, having no knowledge of the above-mentioned circumstances, proceeded from Liverpool to Cardiff, and demanded from the servant of Phillips a return of the beef on the ground that Phillips had dishonestly bought and received it, knowing himself to be insolvent. The defendant threatened to have Phillips arrested for swindling in taking in the beef on the 9th of April, when he must have known that he was in insolvent circumstances. He requested to see Phillips, but Phillips refused then to see him, but sent a message to him by his man, that the beef was taken in in his absence. Phillips sent his man to his solicitor, to whom the defendant reiterated his threats. Ultimately on

the same day the beef was given up to the defendant. On the 17th of April Phillips was adjudged bankrupt, and the plaintiffs were appointed his assignees.

The Court are to be at liberty to draw any inferences from the facts that might be drawn by a jury.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the value of the beef. If the Court should be of that opinion, judgment is to be entered for the plaintiffs for 98*l.* with costs of suit.

Quain argued for the plaintiffs.—Phillips denied himself to the defendant, his creditor, on the 15th of April; that is sufficient to raise a presumption of “a beginning to keep house,” and, therefore, that an act of bankruptcy was committed, to which the title of the plaintiffs as assignees relates back : *Archbold's Bankruptcy*, p. 52 (a). [*Martin*, B.—How does it appear that this was done with intent to defeat or delay a creditor? The defendant was not a creditor. He came to get back his goods as having been obtained from him by fraud. *Pollock*, C. B.—If a trader knows that his creditor has come for money, and denies himself to him, saying he is ill, that may be an act of bankruptcy, but it would not be so if he did not know the object with which the creditor called. There is nothing in the case to shew that if the defendant had come to demand money the bankrupt would not have seen him, and told him that he was not entitled to ask for money, but must take a bill.]

Hugh Hill, who appeared for the defendants, was not called upon to argue.

Per CURIAM.—There must be judgment for the defendant.

Judgment for defendant.

(a) 11th Edition.

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April 23.

WARBURTON v. PARKE.

In the year 1796 S. was seised in fee of a certain farm and also of an estate for life in a certain moor. In 1822, S. and the tenant in remainder joined in a conveyance of the moor to C. in fee, that he might be tenant to the præcipe for the purpose of suffering a recovery, in order to create a mortgage term, but no recovery was suffered. In 1827, S. became bankrupt, and by subsequent conveyances his interest in the moor vested in the defendant, and his interest in the farm vested in the plaintiff. S. always occupied the farm by his tenants who had enjoyed without

REPLEVIN of cattle of the plaintiff taken by the defendant in certain land called Wheelton Moor, in the county of Lancaster.

Avowry.—That the place in which &c., was the close, soil and freehold of the defendant, and because the cattle were in the said place eating up the grass &c., the defendant well avows the taking of the cattle &c. as a distress for the said damage.

Plea in bar (inter alia).—That at the said time when &c. the plaintiff was possessed of land, the occupiers whereof for thirty years before this suit enjoyed as of right and without interruption common of pasture over the said land of the defendant for all their cattle levant and couchant upon the said land of the plaintiff at all times of the year as to the said land of the plaintiff appertaining; and the plaintiff at the said time when &c. put the said cattle being his own commonable cattle levant and couchant upon his said land into the said land of the defendant, and the same were there as in the avowry alleged in the use by the plaintiff of the said right of common.—There was also a plea alleging an enjoyment as of right for sixty years (a).

The replications took issue on the pleas.

interruption the right of depasturing their cattle on the moor. In the year 1856, the defendant distrained the plaintiff's cattle damage feasant when the plaintiff claimed the right of common by enjoyment as of right for the respective periods of sixty and thirty years mentioned in the Prescription Act (2 & 3 Wm. 4, c. 71.)

Held: First, that there was no unity of seisin to extinguish the easement or prevent its existence.

Secondly, that the title to the tenements was such that there could not, in point of law, have been an enjoyment of the right of common for the period of sixty years, *as of right*; for S. being owner in fee of the farm and also tenant for life and occupier of the common, the rights of the tenants of the farm over the common were derived from him, and as he could not have an enjoyment as of a right against himself within the meaning of the statute, so neither could his tenants.

Thirdly, that the conveyance by S. in 1822 to make a tenant to the præcipe, made no difference and consequently that the thirty years claim could not be supported.

(a) There was also a plea of a claim by prescription which failed.

At the trial before *Bramwell*, B., at the Lancaster Summer Assizes, 1856, the following facts appeared.—The plaintiff was occupier of a farm called “Whittles,” in the township of Wheelton, in the county of Lancaster. The defendant was owner of a moor within the same township called “Wheelton Moor,” and the plaintiff as occupier of the farm claimed a right to depasture his cattle on the moor. In the year 1796, Wheelton Moor (with other lands) was conveyed to trustees to the use of Henry Sudell the elder for life with remainder to his first and other sons in tail male. In the year 1822 the moor (with other lands) was conveyed by Henry Sudell the elder and Henry Sudell the younger to William Cerie in fee, that he might be tenant to the præcipe for the purpose of a common recovery being suffered; which it was declared should enure to the use of Richard Entwisle his executors &c. for 1500 years, redeemable on payment of 25,000*l.* and subject thereto to the use of Henry Sudell the elder for life, with remainder to the use of such person for such estate as Henry Sudell the younger should appoint. A common recovery was accordingly suffered, but by mistake it did not include Wheelton Moor. In August, 1827, Henry Sudell the elder became bankrupt, and his estate was conveyed to assignees. In April, 1831, by indenture to which the assignees were parties, Wheelton Moor was conveyed to Thomas Upton and William Slater in trust to sell the same; and in August, 1831, Cerie conveyed the moor to Upton and Slater that they might be tenants to the præcipe in order that a recovery might be suffered. A recovery was accordingly suffered, and in February, 1833, the moor was conveyed in fee by Upton and Slater to the ancestors of the defendant. About the year 1796 (the precise time did not appear), Henry Sudell the elder was seized in fee of the farm occupied by the plaintiff, and in 1828 this farm was conveyed by Sudell’s assignees to William

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Blackbridge in fee, through whom the plaintiff's landlord derived his title. The farm had never been in the actual occupation of Sudell, but had always been occupied by his tenants, who had enjoyed without interruption the right now claimed. The defendant having distrained the plaintiff's cattle on the moor, damage feasant, the plaintiff replevied them, and on the 4th of April, 1856, entered in the County Court for the district a plaint which the defendant removed by certiorari into the Court of Common Pleas at Lancaster.

In answer to questions left by the learned Judge to the jury, they found that the right claimed had been enjoyed for the respective periods of thirty years and sixty years. It was submitted on behalf of the defendant, that as Henry Sudell the elder was at one time possessed of both the moor and farm, there was a unity of seisin in him which extinguished the right. It was contended on the part of the plaintiff that there was no extinguishment, since the two estates were not of equal duration, Sudell having from the year 1796 a life estate only in the moor. The learned Judge directed a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict for him if, in point of law, there was an enjoyment as of right for the periods of sixty years or thirty years.

Atherton, in the following term, moved for a rule nisi accordingly, when the Court refused the rule (*a*) as to the enjoyment as of right for sixty years, and granted it as to the thirty years.

Knowles and *Manisty* shewed cause in last Hilary Term (Jan. 18.)—The facts proved shew that there could not, in point of law, have been an enjoyment of the right claimed for the period of thirty years. Under the Prescription Act (2 & 3 Wm. 4, c. 71), although a claim to a right of com-

(a) The reasons are stated in the judgment, *post*, p. 69.

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mon, which has been actually enjoyed without interruption for thirty years, cannot be defeated by shewing *only* that such right was first enjoyed prior to such period of thirty years, yet it may be defeated in any other way by which the same was liable to be defeated at the time that Act passed: sect. 1. In this case no valid prescription could exist, because there was a unity of seisin in respect of the dominant and servient tenements. Where an allotment of waste land was made to A., under an inclosure Act passed in 1810, and A. claimed in respect of this allotment a right of common of pasture in the waste lands, and a right of pannage in the open woods of the New Forest, shewing an enjoyment, as of right, for the full period of thirty years, it was held that the claim might be defeated by shewing that it never could have had any legal origin: *Mill v. The Commissioner of the New Forest* (a). So, here, the claim may be defeated by shewing, not the commencement of the user only, but that fact coupled with a state of things which would have destroyed a claim by prescription. If it were not so, there would be no reason for the distinction which the Legislature has made between an enjoyment for thirty years and sixty years. It will be argued that the interest of Sudell in the servient tenement ceased in 1822, when he conveyed the estate to Crierie, in order that he might be tenant to the præcipe, and that as the jury have in fact found an enjoyment as of right for thirty years, the claim is established. But the conveyance to Crierie did not divest the estate; he was a mere conduit pipe, and the interest which he took by the conveyance was not subject to the incidents of an estate in fee.

Atherton and Phipson, in support of the rule.—There was an enjoyment of the common of pasture, as of right,

(a) 18 C. B. 60.

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for the full period of thirty years. After the conveyance by Sudell the elder in 1822 he could only be regarded as a cestui que trust. Suppose the servient tenement had been conveyed to a trustee for a period of thirty years, and the trusts had remained unexecuted, might not a right be claimed as against the cestui que trust by enjoyment during that period? Crierie was not the less seised because his seisin was for a particular purpose: he had a base fee. But assuming that Sudell's interest in the moor was not divested by this conveyance in 1822, there was no unity of seisin to defeat the claim, since the two estates were not of equal duration. Where a person is seised in fee of the dominant tenement, and for life of the servient tenement, an easement is not extinguished, but only suspended: *Thomas v. Thomas* (a). Unity of possession will not extinguish a prescriptive right, unless the estate in the land a quâ, and in the land in quâ, are equal in duration, quality, and all other circumstances: *Rex v. Inhabitants of Hermitage* (b). Here the right was suspended until the conveyance in 1822, when it revived.—He also referred to *Onley v. Gardiner* (c).

Cur. adv. vult.

The judgment of the Court was now delivered by

BRAMWELL, B.—In this case we are of opinion the rule should be discharged. The material facts are as follows:—More than sixty years before, and till within thirty years before the commencement of the action, one Sudell was seised in fee of the plaintiff's farm. During the same period he had an estate for life in the land over which the common was claimed, save that in 1822 he joined in a

(a) 2 C. M. & R. 34.

(b) Carth. 241.

(c) 4 M. & W. 496.

conveyance to make a tenant to the præcipe for the purpose of suffering a recovery, in order to be able, in conjunction with the remainder-man, to grant a mortgage for a term of 1500 years. So that, so far as this conveyance operated, Sudell's estate ceased from 1822. But no recovery ever was suffered, and Sudell continued possessed until within thirty years before the action, when he became bankrupt, and all his property was sold, and all community of title between the plaintiff's land and that over which he claimed common, ceased. This common was claimed by prescription, by enjoyment as of right for sixty years, and by enjoyment as of right for thirty years. The claim by prescription failed at the trial; as to the other claims, the jury found there had been an enjoyment as of right, but the state of the title was not ascertained at the trial, and the question was reserved, the plaintiff to be considered to have established his case if the title was such that in law he could have enjoyed as of right.

We are of opinion the title was such that, in point of law, there could not have been an enjoyment as of right. There was no unity of seisin to extinguish an easement or prevent its existence, nor was there any unity of actual possession to prevent an enjoyment as of right. Nor, as to the sixty years' claim, is it enough to shew that the owner of the servient tenement was only tenant for life, for the Prescription Act, section 7, shews that the fee may be bound by an enjoyment as of right during the term of a tenancy for life. But in this case, the lessor of the tenants who occupied the dominant tenement and enjoyed the common, was tenant for life of, and occupier of the common. It is manifest then that all their rights were derived from him, and as he could not have an enjoyment as of right against himself within the meaning of the statute, so neither could his tenants. For suppose there

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had been no right of common attached to the dominant tenement, he could have granted it;—suppose there had been, he could have withheld it; and supposing he merely let the farm with its appurtenances or all benefits usually had therewith, not knowing that that included common still, if common was included, that would have been a grant of it by him. Whatever the tenants enjoyed then, they enjoyed by the grant of their landlord, the occupier and tenant for life of the common; and this, we are of opinion is not an enjoyment as of right within the statute. It is true that the proviso in section 1, “unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing,” supposes there may be an enjoyment as of right though by consent or agreement; but that applies to cases where the title to the two tenements is such that the enjoyment *could be* as of right within the statute, not to where it necessarily cannot be. The right must be as of right against the *land*, not against the *individual*, and it is clear that in this case the question must have been, what did Sudell grant or demise to his tenants? It may be said that if this is so, a lessor of the dominant tenement, taking a week’s tenancy of the servient, would lose all the servitudes. That is not so; he would only lose the statutory mode of establishing them, and he would only lose that when it could be said, as here, that, at the time of his granting the lease, he could grant the servitude, and even if this were otherwise, the case would only be the same as it is where there is a unity of possession during any part of the statutory periods.

These considerations dispose of the sixty years’ claim, as to which the rule nisi was refused. But it is said that there is a difference as to the thirty years’ claim on account of the estate of the tenant to the præcipe. But in the first

place, if that estate was only for life, as was more commonly the case, its duration must be excluded from the thirty years by section 7, and then the time of Sudell's life estate is within the period of thirty years. But in truth, even if the estate of the tenant to the præcipe was nominally a fee, it does not seem to us to make any difference. It was a matter of form; there never was any entry, and Sudell remained in possession with the same rights as before, and his tenants still took by his grant; and indeed, as he could before his conveyance to the tenant to the præcipe have granted a right of common for the term of his life, it seems to us that even if Sudell had actually granted away his life estate, the enjoyment by such a tenant would not have been as of right, even after Sudell had ceased to have any interest, as such enjoyment would still have been under the personal grant of Sudell.

The same considerations therefore apply to the thirty years' claim as to the sixty; and the plaintiff fails as to each.

Rule discharged.

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PERKINS v. THE NATIONAL ASSURANCE AND INVESTMENT
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April 16.

IN this case the following Judge's order was made by consent:—

"I do order that all further proceedings in this cause be stayed on payment of 58*l.* 16*s.* 11*d.* debt, together with costs to be taxed, and that in default of payment of the said debt and costs, or any part thereof respectively as aforesaid, the plaintiff shall be at liberty to sign final judgment, and issue execution for the whole amount remaining unpaid at the time of such default, with the costs of judgment and execution," &c.

Where a Judge's order was made for payment of debt and costs, which were demanded immediately after taxation, and not being paid, the plaintiff on the same day signed judgment.—*Held*, that the judgment was irregular.

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The costs were taxed at 6*l.* 18*s.* 4*d.*, and immediately after the application was made, the plaintiff's attorney demanded of the clerk of the defendants' attorney, who attended the taxation, the amount of debt and costs, which not being paid, the plaintiff's attorney, on the same day, signed judgment and gave notice of taxing the costs of the judgment on the following day. On that day the clerk of the defendants' attorney attended before the Master, and offered the plaintiff's attorney a cheque for 65*l.* 15*s.* 3*d.*, which was refused, and the costs were taxed and execution levied. A summons was then taken out, calling on the plaintiff's attorney to shew cause why the judgment and all subsequent proceedings should not be set aside for irregularity, on the ground that it was signed before the plaintiff was entitled to sign the same. The summons was heard before *Coleridge, J.*, who made an order accordingly.

Quain now moved for a rule to shew cause why the order of *Coleridge, J.*, should not be rescinded.—The judgment was regular. In *Arch. Prac.*, vol. 2. p. 914, 9th ed., it is said, "If the debt and costs be not paid according to the terms of the order, judgment may be signed and execution issued." There is no rule of practice which entitles the defendant to any time for payment: he is bound to have the money ready when the taxation is completed. [*Martin, B.*—A reasonable time ought to be allowed for the attorney to communicate with his client. *Bramwell, B.*—If no time for communication with the client is necessary, the plaintiff's attorney might always sign judgment, because he might send a clerk with authority to tax the costs, but with no authority to receive the money; therefore, in some cases, time must be allowed.] By the terms of the order the plaintiff is entitled to sign judgment "in default of payment of the debt and costs respectively."

There is a default in payment if the debt and costs are not paid immediately the costs are taxed. [*Bramwell, B.*—The Master's office is not the proper place to pay and receive money.]

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POLLOCK, C. B.—Without laying down any rule as to what would, under all circumstances, be a reasonable time, we are all of opinion that in this case the judgment was signed too soon. It is not reasonable to expect that an attorney's clerk, who goes to the Master's office to superintend the taxation of costs, should bring with him a sum of money, however large the amount, to pay the debt and costs,—for the plaintiff would not be bound to take a cheque. We decide nothing more than that in this case the judgment was irregular.

MARTIN, B., and BRAMWELL, B., concurred.

Rule refused.

AMBROSE and Another v. COOK.

April 24.

DECLARATION on a bond in the sum of 1,600*l.*—
Breach: non payment.

Pleas.—First: that by an order of adjudication made by the Court for the Relief of Insolvent Debtors in England, according to the statute made and passed &c. (1 & 2 Vict.

The defendant mortgaged to B. certain premises as a security for money lent, and B. obtained a judgment against the defendant for

the principal and interest. The mortgage debt was afterwards assigned to the plaintiff in trust. The defendant took the benefit of the Insolvent Act, 1 & 2 Vict. c. 110, and the mortgage debt and judgment were inserted in his schedule. The defendant, in order to get rid of the judgment, afterwards agreed with the plaintiff to pay a part of the principal and interest due on the mortgage, and to join with a surety in a bond for payment of the remainder by instalments. The money having been paid and the bond given, satisfaction of the judgment was entered up. The plaintiff sued the defendant on the bond, and the jury found that in making the agreement the defendant's intention was to purchase the plaintiff's interest in the mortgaged premises and get rid of the judgment.—*Held*, that the transaction was not a new contract or security for payment of a debt, in respect of which the defendant had been discharged, within the meaning of the 91st section of the Insolvent Act.

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c. 110), defendant was duly discharged of and from the said cause of action, and the said order remains in force.

Secondly: that by an order of adjudication made by the Court for the Relief of Insolvent Debtors in England according to the said statute, the defendant was duly discharged of and from a certain debt, to wit, a debt due from him to one F. Beevor, and the same order remains in force; and the defendant became and was thereby entitled to the benefit of the said Act in respect of the said debt; and the said bond in the declaration mentioned was afterwards made and given upon a new contract, or as a security for the payment of the said debt.

Replication to first plea.—That the defendant was not by the said order in that plea mentioned discharged according to the said statute of or from the said cause of action.—To the second plea:—that the defendant was not by the said order in that plea mentioned discharged according to the said statute of or from the said debt in the second plea mentioned, nor was the said bond made or given upon a new contract or as a security for payment of the said last mentioned debt.—Issues thereon.

At the trial before *Bramwell*, B., at the Middlesex Sittings in last Hilary Term the following facts appeared:—In the year 1846, the defendant who was a builder, borrowed of F. Beevor the sum of 1000*L*, and as a security mortgaged to him certain premises. The principal and interest not having been paid, F. Beevor obtained a judgment against the defendant for 1500*L*, which was duly registered. The mortgage debt was afterwards assigned to the plaintiffs in trust. In the year 1848 the defendant took the benefit of the Insolvent Act, on which occasion the mortgage debt and judgment were inserted in his schedule. The defendant, in order to get rid of the judgment, entered into an agreement with the plaintiffs to pay 200*L*., and the interest due

on the mortgage debt, and to join with a surety in the bond, on which this action is brought, for payment of the residue by instalments. The money having been paid and the bond given, satisfaction of the judgment was entered on the roll.

It was submitted, on behalf of the defendant, that the bond was a new security in respect of the debt from which he had been discharged, and was therefore void by the 1 & 2 Vict. c. 110, s. 91 (a). It was contended, on the part of the plaintiff, that the transaction was merely a purchase of the mortgage and judgment. The learned Judge left the question to the jury, and they found as a fact that the defendant's intention was to purchase the plaintiffs' interest in the mortgaged premises, and get rid of the judgment. A verdict was thereupon entered for the plaintiffs

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(a) Enacts,—“ That after any person shall have become entitled to the benefit of this Act by any such adjudication as aforesaid, no writ of fieri facias or elegit shall issue on any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof except upon the judgment entered up against such prisoner according to this Act; and that if any suit or action shall be brought or any scire facias be issued against any such person, his heirs, executors, or administrators, for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against or any statute or recognizance acknowledged by such person for the

same, except as aforesaid, it shall be lawful for such person, his heirs, executors, or administrators, to plead generally that such person was duly discharged according to this Act by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially; whereto the plaintiff or plaintiffs shall or may reply generally, and deny the matters pleaded as aforesaid, or reply any other matter or thing which may shew the defendant or defendants not to be entitled to the benefit of this Act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied in case the defendant or defendants had pleaded this Act, and a discharge by virtue thereof, specially.”

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for the amount due, leave being reserved to the defendant to move to enter a verdict for him.

Petersdorff, in the same term, obtained a rule nisi accordingly, against which

Wells, Serjt., and *J. Brown* appeared to shew cause, but the Court called on

Petersdorff to support the rule.—This bond is a new security for payment of a debt from which the defendant was discharged under the 1 & 2 Vict. c. 110, and is therefore within the prohibition of the 91st section (a) of that Act. The transaction is the same in effect as if the insolvent had said to his creditors, "I will give you a bond for your debt from which I am discharged if you will transfer that debt to me, and I will give you a sum of money in addition." That creates a new liability in respect of the old debt. [*Martin*, B.—It is not a security for the old debt, but a liability in respect of the purchase of that debt. It was a question for the jury whether the transaction was a bonâ fide purchase of the debt, or a device to avoid the statute.] Even if it be a purchase, it is a "new contract" within the meaning of the prohibition in the 91st section. [*Bramwell*, B.—Suppose the defendant had said to the plaintiffs "I find this judgment an incumbrance, if you will enter up satisfaction I will build you a house," would not that have been a valid contract?] In *Evans v. Williams* (b) the defendant and his surety signed a promissory note, and the defendant was afterwards discharged under the Insolvent Act. The payee applied to the surety for payment, whereupon the defendant, to prevent the surety being sued, joined him in a new note: it was held that the payee could not recover on this note against the defendant, as it was a new

(a) *Ante*, p. 75.

(b) 1 C. & M. 30.

contract for the old debt, though the new consideration of forbearance to the surety was added. [*Pollock*, C. B.—Suppose a person borrowed 1000*l.* on a security not worth 500*l.*, and then took the benefit of the Insolvent Act he would be discharged from the debt, but his creditor would hold the security. That being so, is there anything to prevent the insolvent from saying to his creditor, “I wish to have my property back again, and if you will transfer it to me I will give you more than its value?”] The effect would be to revive the debt from which the insolvent was discharged.

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POLLOCK, C. B.—The rule must be discharged.

MARTIN, B.—The real question is, whether the transaction was a purchase of the judgment, or a new contract or security for payment of the debt. That was a question for the jury, and it was left to them by my brother *Bramwell*, and they found that the defendant's intention was to purchase the plaintiffs' interest in the mortgaged premises, and get rid of the judgment. There is nothing in the statute to make such a transaction illegal.

BRAMWELL, B.—At first I entertained some slight doubt, but on consideration I think that the rule ought to be discharged. My doubt arose from the express prohibition in the statute, that no action shall be brought on any new contract or security for payment of a debt in respect of which an insolvent has been discharged, though such contract or security would otherwise be valid. The statute, according to the decisions upon it, having said that a new consideration shall not make the promise binding, this case cannot be held not to be within the statute merely because there is a new consideration. It is difficult to lay down any definite rule, and every case must be judged by

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itself. If the jury had found that the defendant's intention was to pay the old debt and also to get some advantage that would not have been valid. But if the defendant had said to the plaintiff, "I wish to purchase the mortgaged premises, and am willing to give you so much money for them," it could not be contended that that would not have been a good bargain; and if so, why should it be bad because the defendant also wishes to have satisfaction of the judgment entered up? A doubt suggested itself to me, whether, in substance, the transaction was not a purchase of the judgment with a collateral bargain for the mortgaged property, in which case the contract would have been invalid; but in truth the defendant had no thought or intent to pay the old debt, and all that he wanted was to purchase certain advantages. I cannot help thinking, therefore, (although it is difficult to draw the line in these cases) that this particular transaction is not within the statute.

CHANNELL, B.—I am of the same opinion, and I agree that it is difficult to lay down any general rule. The cases, however, have established, that if an insolvent enters into a new contract or security for payment of a debt in respect of which he has been discharged, such contract or security is void, although founded on a new consideration, such as would make it good in other cases. Here the transaction is equivocal, and might be only a contract for payment of the debt, and if the jury had found that it was an attempt to evade the statute, it would have been void. But the jury have found that the defendant bonâ fide intended to purchase the securities, and therefore the case is not within the statute.

Rule discharged.

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THE declaration stated that the plaintiffs caused to be put up and exposed to sale by public auction certain Rounds belonging to the estate of one Thomas Moffatt, and respectively called Shotley Bridge Round and Midomsley Round, upon and subject to the following amongst other conditions of sale: that the highest bidder should be the purchaser, &c.; that the purchaser should immediately pay to the auctioneer, or agent for the plaintiffs, a deposit of 2*l*. 10*s*. per cent., if required, on the amount of the purchase money, and sign the agreement annexed to the conditions of sale for payment of the residue on or before the 22d day of April then next, or on delivery to him of the respective lots; that the remainder of the purchase-money should be considered as payable in cash; but if the purchaser should be prepared with bills or other securities, to the entire approbation of the agent for the plaintiffs for the remainder of such purchase-money, payable at six, twelve, or eighteen months' date, from the said 22nd day of April, the plaintiffs would consent to receive such bills or other security in payment, and forego their right to be paid in cash, and would not require discount or interest on such bills or security; that in case the purchaser should fail to complete his purchase in compliance with the preceding conditions the deposit-money should be forfeited, and the plaintiffs be at liberty to resell the said property either by private contract or public auction; and the deficiency, if any, upon such second sale, with all expenses attending the same, should be made good by the defaulter at the said sale, and be recovered against him as liquidated

Leave and licence cannot be pleaded to a breach of contract; but the defendant must shew an exoneration or discharge.

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damages.—Averments: That at the said auction the plaintiffs agreed to sell to the defendant, as and being the highest bidder thereat, and the defendant being such highest bidder agreed to buy of the plaintiffs the said Rounds at a certain price, and upon and subject to the said conditions and the terms therein contained; that the plaintiffs did all things necessary, &c., to entitle them to have the said agreement abided by and fulfilled, and the said purchase completed by the defendant; and to have the deposit and the residue of the purchase-money paid by the defendant to the plaintiffs, according to the said conditions, and the said 22nd day of April elapsed before this suit.—Breach: That the defendant broke his said agreement in this, that he did not pay the said deposit according to the said conditions; and also in this, that he neither paid nor was able to pay the residue of the said purchase-money according to the said conditions, nor was he prepared with bills or other securities to the approbation of the plaintiffs or their agent for the remainder of the said purchase-money, but wholly failed to complete his said purchase in compliance with the said conditions, and in such way as, according to the same conditions, entitled the plaintiffs to resell the said Rounds and to have the deficiency, if any, upon such second sale, with all expenses attending the same, made good by the defendant as such defaulter. Whereupon the plaintiffs, according to the said conditions, resold the said Rounds by public auction; that upon such second sale there was a deficiency, and that certain expenses attended such second sale, which deficiency and expenses amounted to a large sum, to wit 237*l.* 17*s.* 2*d.*, and that the plaintiffs did all things necessary &c. to entitle them to have the said deficiency and expenses made good by the defendant as such defaulter according to the said condition; and that the time for the defendant's making

good the same, elapsed; yet the defendant has not made good the same, and the sum of 237*l.* 17*s.* 2*d.* remains wholly unpaid and unsatisfied.

Plea.—As to the breach in the count mentioned, the defendant says that he committed the same by the leave and licence of the plaintiffs.

Demurrer and joinder therein.

Gray, in support of the demurrer.—The plea is bad. It is in effect a plea of leave and licence not to pay a debt. A plea of exoneration before breach is good: *King v. Gillett* (a) but after a cause of action has once accrued it can only be discharged by satisfaction or release. In *Peytoe's case* (b) it is said, "So if a man be bound in a statute recognizance, or bond, and afterwards a defeasance is made to pay a less sum, now this sum in the defeasance is collateral; and therefore if the obligor tenders it at the day, and it is refused, the obligee loses it for ever, as it is held in 33 Hen. 6, 2, a. b. and yet in such case the obligor by accord betwixt them, may give a horse &c. in satisfaction of the money in the defeasance, for the contract, was originally for money. But if a man by contract, or assumpsit (without deed) be to deliver a horse or to build a house, or to do any other collateral thing, there money may be paid by accord in satisfaction of such contract: for as a contract upon consideration may commence by word, so by agreement by word for any valuable consideration it may be dissolved." Therefore in order to discharge the defendant from the performance of this contract there must have been some consideration; but the allegation that defendant broke his contract by the leave and licence of the plaintiff does not import any consideration. [*Bramwell, B.*—In Com. Dig. tit. "Action upon the Case upon

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(a) 7 M. & W. 55.

(b) 9 Rep. 79 b.

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Assumpsit" (G) it is said, "If a man make a promise he to whom it was made, before breach, may discharge it by parole" (a).] After breach, a parole contract cannot be discharged without consideration, except in the case of bill of exchange and promissory notes: *Foster v. Dawber* (b). Where the contract is by deed, it cannot be discharged by a mere licence not under seal, even with consideration. This breach could only be discharged by a new contract founded on some consideration.

Hawkins, contra.—No doubt if money is actually due the debt cannot be discharged without consideration. But this plea states that the defendant committed the breach by leave of the plaintiff, therefore, before the breach the plaintiff gave the defendant leave not to perform the contract; and it is clear that a parole contract may be discharged by word of mouth, without consideration. [*Pollock*, C. B.—The plea cannot be so construed, because a person cannot give another leave and licence not to do something. If the defendant had said to the plaintiff, "I cannot pay you now but I will to-morrow or a fortnight hence," that state of facts would have proved this plea.]

Gray was not called upon to reply.

POLLOCK, C. B.—We are all of opinion that the plea is bad. If it is intended as a plea in exoneration of the contract, it should have been so pleaded, that the Court might understand that the contract was discharged. A plea of leave and licence to do an act is intelligible, but a plea of leave and licence not to pay money may mean not to pay it to-morrow, or a fortnight or a year hence. Such a plea

(a) See also 1 Smith's Lead. Cas., p. 253, 4th ed.

(b) 6 Exch. 839.

is proper where there is a positive act, as in cases of trespass, but it is inapplicable to contracts, where the matter is negative.

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MARTIN, B.—I am of the same opinion. Looking to the authorities, I can find no instance of a plea of leave and licence to a breach of contract. It is applicable to cases of tort, not to contract. If a party is relieved from the performance of his promise, the proper expression is, that he is “exonerated or discharged;” it is an abuse of language to call it leave and licence.

BRAMWELL, B.—I concur in giving judgment against the defendant. In an action on a simple contract, a plea of exoneration before breach is good. The law is thus laid down in *Byles on Bills*, p. 168, 7th ed.: “It is a general rule of law, that a simple contract may, *before breach*, be waived or discharged, without a deed and without consideration; but after breach there can be no discharge, except by deed or upon sufficient consideration.” Assuming, then, that a plea of exoneration before breach would have been good in this case, I thought that the present plea might be so read; and therefore, if sitting alone, I should have been disposed to hold it good, because when a person says “I did such a thing by leave and licence,” he must have got leave and licence before he did it. So if he omitted to do something by leave and licence, he must have had leave and licence before the time for doing it arrived. I should therefore have thought that the plea amounted to this,—“Before the time when I ought to have done the act, the breach of which is the cause of action, I had leave and licence not to do it.” But as my Lord Chief Baron and my brothers *Martin* and *Channell* think that that is not the meaning of the plea, I will not oppose the

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judgment against it, for even if I am right in my construction, the defendant ought to have pleaded the exoneration in a proper form.

CHANNELL, B.—I concur in thinking that the plea is bad.

Judgment for the plaintiff.

May 2.

BOOTH v. KENNAED.

In 1852, the plaintiff obtained a patent for an invention of improvements in the manufacture of gas; which was stated in the specification to "consist in the direct use of seeds, leaves, flowers, branches, nuts, fruit, and other substances and matters, containing oil, or oily or resinous matter," and it was also stated that the mode of

THE declaration stated, that the plaintiff was the first and true inventor of a certain new manufacture, that is to say, of certain improvements in the manufacture of gas; and thereupon her Majesty, &c., by letters patent, &c., granted the plaintiff the sole privilege to make, use, exercise, and vend the said invention within England for the term of fourteen years from the 12th day of November, 1850, and from the 8th day of May, 1852, subject to conditions that the plaintiff should within six calendar months next after the dates respectively of the said respective letters patent cause to be enrolled, &c., instruments in writing under his hand and seal particularly describing and ascertaining the nature of his said inventions, and in what manner the same were using the materials, might be "the same as the apparatus used in the ordinary mode of making gas from coal." The claim was as follows:—"I claim for making gas direct from seeds and matter herein named for practical illuminations or other useful purposes, instead of making it from the oils, resins, or gums, previously extracted from such substances." In 1829, H. had obtained a patent for improvements in illuminations or artificial light, and by his specification he proposed to use fatty substances, such as greaves or graves, also the residuum after the oil had been expressed from seeds, such as oil cake, also beech nuts, mast, cocoa nuts and other matters abounding in oil, and he proposed to use these substances separately and in combination. The plaintiff having brought an action for the infringement of his patent.

Held: First, that H.'s specification shewed that the making gas direct from seeds and other oily matters was not new at the date of the plaintiff's patent.

Secondly: That as the want of novelty appeared distinctly from a written instrument, it was for the Court and not the jury to determine the identity of the two supposed inventions.

Thirdly: That the claim, being merely for making gas direct from seeds and matter stated in the specification, without reference to any method of doing it, was too large and general a claim and could not be supported.

to be or might be performed, &c.: and the defendant infringed the said patent rights.

Pleas (inter alia).—First: not guilty.

Second.—That the plaintiff was not the true and first inventor of the said supposed invention or inventions as alleged.

Fourth.—That the supposed invention or inventions was not, nor were of any use, benefit or advantage whatsoever to the public.

Fifth.—As to the causes of action, so far as the same relate to letters patent granted to the plaintiff on the 12th day of November, 1850, for an alleged invention of certain improvements in the manufacture of gas: that the said supposed invention was not a new manufacture.

Sixth.—That the plaintiff did not by any instrument or instruments in writing under his hand and seal particularly describe and ascertain the nature of the said supposed invention or inventions and in what manner the same were, or either of them was, to be performed.

Eighth.—As to the causes of action so far as the same relate to letters patent granted to the plaintiff on the 8th day of May, 1852, for an alleged invention of certain improvements in the manufacture of gas: that the last mentioned supposed invention was not a new manufacture.
—Issues thereon.

At the trial, before *Pollock*, C. B., at the London sittings after last Michaelmas term, the plaintiff gave in evidence a patent dated the 12th November, 1850, granted to him for an invention of “Improvements in the Manufacture of Gas”; and also the specification of that patent, in which the improvements were stated to consist “in the construction of the apparatus used in making gas from oleaginous, fatty, resinous, tarry, or spirituous substances, and in the mode of working the apparatus.” The plaintiff also gave in evidence another patent granted to him for an invention of

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"Improvements in the Manufacture of Gas," dated the 8th May, 1852; and the specification which (so far as material was as follows:—

"Heretofore in manufacturing gas from oils, oily or resinous matter, &c., it has been usual to go through the costly process of obtaining the oils, &c., from seeds and other substances, and to use the same in a fluid or semi-fluid state. Now, my improvements consist in the direct use of seeds, leaves, flowers, branches, nuts, fruit, and other substances and matters containing oil or oily or resinous matter, or other matter useful in the manufacture of vegetable gas.

"The mode of using seed and constructing the apparatus used under this my patent in preparing gas may be the same as the apparatus used in the ordinary mode of making gas with coal, but I prefer projecting the seed, &c., into a red hot retort, and subjecting it for a certain time to a proper heat, then withdrawing the expended residuum and again supplying the retort with another quantity of seed, and so on, be the same more or less, at one time.

"For the purpose of exemplification, I give a plan of a retort which includes great facilities for the purpose of making gas from seed, &c., but this is only one of many that may be designed for the purpose.

"It will be seen, by using seed that the making of gas may be carried out on the smallest scale, or extensively, so that every housekeeper may become the manufacturer of a wholesome and innocuous gas light, for which purpose I also give a model or plan for the construction of a small domestic apparatus. By using seed, &c., my plan becomes adapted to all climates, because since it does away with the necessity of coal for gas making, and as every country grows oleaginous seed, &c., more or less, and as it is not requisite to express the oil from the seed, so the patent brings these

articles of agricultural or of vegetable production of all climates directly into use for gas making. I do, therefore, use mustard seed, rape seed, linseed, dodda, sesame, bene, gengelle, teel, palm nuts, ground nuts, cocoa nuts, india-rubber, gutta percha, thyme, pitch pine, castor seed, niger poppy, cotton seed, olives, the residuum of the olive press, and that of other seeds, for producing gas, which materials are the productions of Europe, Asia, Africa and America; or I use any other resinous or oily substance than these here named, without any of them undergoing previous preparation beyond reducing them to pieces, if so required, to place them in the retort, or by mixing a little water with some seeds to assist in the development of the gas, which is known as a chemical requirement, as in the use of mustard seed, &c." (Then followed a description of the apparatus).

"I claim for making gas direct from seeds and matters herein named, for practical illuminations, or other useful purposes, instead of making it from the oils, resins, or gums previously extracted from such substances."

The plaintiff also gave general evidence that the invention was both novel and useful. The defendant gave in evidence (amongst other documents^(a)), the patent and specification of Edward Heard, the former dated the 12th February, 1829, and intituled "A certain Improvement or Improvements in Illumination, or producing Artificial Light." The specification of this patent was as follows:—

"Illumination or artificial light being usually produced from the decomposition of solid and fluid bodies, which are converted by the agency of heat into a gaseous state, and on ignition afford light, I therefore take, from the

(a) These documents were the specification of John Taylor's patent of the 14th June, 1815; the specification of Philip Douglass's patent of the 15th June,

1824; Engineers' and Mechanics' Encyclopædia, 1836, Article "Gas Lighting;" specification of George Low and Frederick John Evans patent of the 20th January, 1862.

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class of those solid substances which have not been heretofore used for making inflammable gas for that purpose, a residuary matter obtained in the manufacture or preparation of tallow from raw fats, known in commerce by the name of greaves or graves, as also the residuary matters from other species of fats commonly called stuff. I likewise take the residuary or refuse substances which are obtained in manufactories where horns, hoofs, bones, hides, skins, leather, or other greasy or inflammable matters are employed, as also those left after the expression of oils from the seeds, such as are known in commerce by the names of linseed oil cake, rape seed, oil cake, mustard seed cake, almond oil cake, poppy oil seed cake, and all others so produced. I also use beech nuts or mast, cocoa nuts, and all others abounding in oil which have not hitherto been generally or publicly known to have been employed for this purpose. I employ these solid bodies either separately or in combination with each other, and in such proportions as may be found most suitable for the production of light of the best quality and with most economy. These substances are to be placed in retorts or other proper vessels, and exposed to the requisite degrees of heat for eliminating or setting free their gaseous products, and which are afterwards to be collected and purified for the purposes of illumination in any of the usual and well-known methods. From the class of fluid inflammable bodies, as well as those of a butyraceous nature, I take coal tar, the black oil obtained in the distillation of bones and other animal substances, cocoa nut oil, palm oil and other similar inflammable bodies, and mix two or more of them together in those proportions which may be found most advantageous for the production of a good light, and at the least possible expence, and which, of course, must necessarily vary, according to the fluctuation of their prices at different periods of time, as well as the intentions

of the operator. This compound oily mixture is to be decomposed by the application of heat in a similar manner, and by the employment of similar apparatus, to those usually made use of in the production of oil gas in coal gas works. The period at which I would introduce the oily mixture above named into the usual retorts employed for the production of coal gas would be that in which the coal has ceased to afford gas suitable for the purposes of illumination, and is producing the light carburetted hydrogen gas, which possesses but little illuminating power, the coke being then in a state of incandescence, which is favourable to the immediate decomposition of this oily mixture, and for facilitating the formation of heavy carburetted hydrogen gas."

The defendant also gave in evidence the following passage from "Parke's Chemical Essays," p. 379, (published in 1823):—"An ingenious and highly estimable friend of mine, who has lately been engaged in lighting some of the principal streets of Paris with oil gas, does it in a way never before attempted. He thus writes,—'We are going on quite a new principle. Coal is very dear and bad here, and it struck me that the oleaginous seeds, which are cheap and abundant, might answer the purpose. We made our experiments and found that by this means we can produce a cheaper and better gas than from coal, and more than this, from oil; for by taking the oil seeds we save all the waste and expence of extracting the oil and have the substance in a much fitter state for decomposition. We have a patent for this invention in France, and have met with great encouragement from the Government.'"

The learned Judge told the jury that if they believed that the specifications and books given in evidence by the defendant were published before the date of the plaintiff's patents, they should find a verdict for the defendant,

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on the ground that the invention was not new. His Lordship also ruled that the claim in the second patent being merely for making gas direct from seeds, &c., without reference to any method of doing it, was too large (a). A verdict was then entered for the defendant, leave being reserved to the plaintiff to move to enter the verdict for him, with 1*s.* damages, if the Court should be of opinion that he was entitled to recover.

Webster, in the following term, obtained a rule nisi accordingly, against which

Sir *F. Thesiger* (with whom was *J. Brown* and *Hindmarch*), shewed cause in the present term (April 23 & 24).—The questions now raised were not under consideration in the Court of Exchequer Chamber (b). That Court only decided that the invention, described in the second patent, might, if new, be the subject of a patent: it is now submitted, first, that assuming it to be new, the claim is too large, and consequently the specification is bad; secondly, that the evidence on the part of the defendant shews that the invention is not new, and as such evidence consists of written instruments, it is for the Court and not the jury to determine the question of novelty. First, the claim cannot be supported: it is a claim to protection for an idea which is suggested in the specification, viz., the making gas direct from seeds, and not to any particular means or apparatus for carrying out such idea in practice. In *Neilson v. Harford* (c), some doubt was entertained in the course

(a) The plaintiff's counsel admitted that it was essential to the plaintiff that he should recover on the second patent, and it was arranged between the parties that if the Court should be of opinion that the plaintiff was entitled to recover on that patent, the ques-

tion as to the first patent and also a Chancery suit then pending between the parties should be referred to an arbitrator.

(b) *Booth v. Kennard*, 1 H. & N. 527.

(c) 8 M. & W. 806.

of the argument, whether the specification was not of a patent for a *principle*, but the Court ultimately decided that the claim was not for a mere principle, but for a mode of applying a well-known principle, viz., the heating of air, by means of a mechanical apparatus to fires and furnaces. So in *Hall v. Jarvis* (a), the claim was not to the monopoly of a flame of gas or a current of air, but the monopoly of using them to clear lace. If this claim had been of a particular method of making gas direct from seed, whereby a cheaper or better article was produced, the specification would have been good. The decision in *Crane v. Price* (b), has, indeed, been questioned, but it may be supported on the ground that the combination of known materials produced a new result: *Dobbs v. Penn* (c). Here there is no claim to any "manufacture." The word manufacture denotes something made, not a mere philosophical or abstract principle: *Rez v. Wheeler* (d). A patent cannot be taken out for a principle, unless it is coupled with some mode of carrying it into effect: *Jupe v. Pratt* (e). The nature and extent of the claim is clearly a question for the Court: *Hill v. Thompson* (f).—Secondly, the documents adduced in evidence at the trial shew that the supposed invention was well-known at the date of the plaintiff's patents.—(They then referred to the above mentioned passage in Parke's Chemical Essays (g) and commented on the specification of Heard's patent (h).—The want of novelty appearing from written documents; it was the province of the Judge to compare them with the plaintiff's specification and direct the jury accordingly: *Bush v. Fox* (i).—The Court then called on

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(a) 1 Webst. P. C. 100.

(e) 1 Webst. P. C. 144.

(b) 4 M. & G. 580; 1 Webst. P. C. 393.

(f) 1 Webst. P. C. 237.

(c) 3 Exch. 427, 432.

(g) *Antd.*, p. 89.

(d) 2 B. & Ald. 345.

(h) *Antd.*, p. 87.

(i) 5 H. L. Cas. 707.

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Macaulay and Webster to support the rule.—First, according to the true construction of the specification, it does not claim a mere idea or principle, but a principle carried out in a particular way, viz., the making gas direct from seed by the apparatus described. The Court of error in deciding that the invention was the subject of a patent, must have so construed the specification. The rule of law is, that such a construction ought to be put on a specification as will, consistently with the fair import of the language used, make the claim coextensive with the actual discovery: *Haworth v. Hardcastle* (a). The result of this process being a better and a cheaper article, that is the subject of a patent: *Crane v. Price* (b), *Neilson v. Harford* (c).—Secondly, the invention is new. The mere suggestion of the same principle in a book previously published will not vitiate a patent. In *Woodcroft's Patent* (d) Lord Brougham said, "The mention in a book does not signify, unless it is in such a way that anybody could easily make and use the invention." The question is, whether there has been such a publication as to make the description a part of the public stock of information: *Stead v. Williams* (e). Heard's specification does not describe the mode of manufacture mentioned in the plaintiff's patent. Before these documents can be used as impeaching the plaintiff's patent, it is incumbent on the defendants to shew by evidence that if the process mentioned in them was carried out, it would produce the same result.

Cur. adv. vult.

The judgment of the Court was now delivered by

(a) 1 Bing. N. C. 182.

(b) 4 M. & G. 580.

(c) 8 M. & W. 806.

(d) 2 Webst. P. C. 23.

(e) 2 Webst. P. C. 143.

POLLOCK, C. B.—This was an action for the infringement of two patents; the first dated the 12th of November, 1850, and entitled “An Invention of Improvements in the manufacture of Gas;” the second, the 8th of May, 1852, having the same title. There were the usual pleas of not guilty: that the plaintiff was not the first inventor, that the invention was not a new manufacture, and that no sufficient specification was enrolled. At the trial general evidence was given to entitle the plaintiff to recover in respect of the second patent, as to its novelty and utility; but on the part of the defendant, evidence was given of several patents and specifications which had been enrolled prior to the plaintiff’s patents, and of one publication, viz., Parke’s Chemical Essays, published in 1823.

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The plaintiff’s second patent was described in the specification to “*consist in the direct use of seeds, leaves, flowers, branches, nuts, fruit, and other substances and matters containing oil or oily or resinous matter* ;” and the mode of using the materials, it was stated, *might be the same as the apparatus used in the ordinary mode of making gas from coal*. The claim was in these words:—“I claim for making gas direct from seeds and matters herein named, for practical illumination or useful purposes, instead of making it from the oils, resins, or gums previously extracted from such substances.”

On the part of the defendant, a patent granted to Edward Heard on the 12th of February, 1829, with its specification, was given in evidence. The inventor, by his specification, proposed to use fatty substances such as greaves, or graves; also the residuum after the oil had been expressed from seeds, such as oil cake; also beech nuts, mast, cocoa nuts, and other matters abounding in oil, and he proposed to use these substances *separately*, and in *combination*. The defendant also gave in evidence a passage from Parke’s

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Chemical Essays, which it was admitted had been generally circulated in this country before the date of the plaintiff's patents, from which it might be collected that the method of making *gas from oil direct* was known in this country before the date of the plaintiff's first patent; but for the reason given presently, it is not necessary to state the passage from Parke's Essays.

The Chief Baron upon this evidence thought, at the trial, that Heard's patent and specification which expressly named beech nuts and cocoa nuts, and referred to oily and fatty substances, and also the publication of Parke's Essays, had anticipated the plaintiff's discovery as to making gas direct from substances containing fatty and oily matter, such as seeds, &c., and by consent of the parties he directed the jury to find a verdict for the defendant, reserving the point for the opinion of the Court, who were to decide it and enter the verdict for the plaintiff, damages 1*s.*, if they thought the plaintiff entitled to a verdict: he also decided that the claim on the second patent, being merely for making gas direct from seeds and matters stated in the specification, without any reference to any method of doing it, was too large and general a claim, and could not be supported.

The jury accordingly found a verdict for the defendant on the two issues as to novelty and specification; and the question we have to decide is, whether the direction given at the trial was wrong, and whether a verdict ought to be entered for the plaintiff, damages 1*s.*

The case had been tried on a former occasion when a bill of exceptions was tendered to the ruling of the Chief Baron, which was argued in the Exchequer Chamber (a), and a venire de novo awarded. On looking into that case, it appears to us that the Exchequer Chamber merely decided

(a) 1 H. & N. 527.

that the invention of making gas direct from seeds, or other oily and fatty matters, was one which, *if new*, might be the subject of a patent, if properly specified; but they gave no judgment, nor even any opinion, upon the questions now before the Court, viz.: first, whether, assuming it to be new, and that no one had ever before obtained gas direct from seeds or oily matters, the specification enrolled is a good specification; or secondly, whether, with reference to Heard's specification the invention is new. Heard's patent and specification were not before a Court of Error, not having been given in evidence on the former trial. We entirely concur in the decision of the Court of Exchequer Chamber, as we understand it; but it appears to us that the specification is the document which ascertains the nature of the invention and the manner of performing it. The plaintiff, by his specification, claims generally the invention of making gas direct from oily substances, without obtaining the oil previously and then making it from the oil; and he claims to do this without reference to any method of doing it. We think that Heard's specification clearly shews that as a general fact, (viz. making gas direct from seeds and other oily matters), the invention was not new, and it was decided in *Bush v. Fox* (a) that where the want of novelty appeared distinctly from documents or written instruments, such as a prior patent and specification, it was for the Court to take notice of the identity of the two supposed inventions, and the want of novelty, therefore, in the second. That Heard had discovered, and had communicated to the world, that gas might be made direct from nuts and other oily and fatty substances, appears to us to be quite clear from his specification enrolled. We think it was not necessary to submit this to the jury and take their opinion on it; it is, we think, the plain meaning of

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(a) 5 H. L. Cas. 707.

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the written document, and we think it is for the Court to construe it; and as this is part of the invention claimed by the plaintiff in his second patent, we think the plaintiff's invention is so far not new, and therefore the invention as a whole cannot be claimed as new.

We are also of opinion that the claim is too large and that such claim cannot be supported. It is a claim to make gas direct from seeds—not in any mode pointed out in the specification, but generally. After the publication of Heard's specification no patent could be taken out for the process generally, though a patent might be taken out for a particular method of doing it. We think the plaintiff's second patent was not for any particular method of doing it, but for the doing of it by any method; and we think if even it had been new (which it turns out not to be), such a mode of specifying and claiming the invention cannot be sustained as a good specification.

We have not in our judgment taken any notice of the publication in Parke's Essays. It was contended that the Judge at the trial could not decide upon that, but ought to have left it to the jury. We think it unnecessary to express any opinion on this point, as we think that the construction and effect of Heard's specification is clearly for the Judge or the Court, and as that shews to our minds most satisfactorily that the invention (as claimed by the plaintiff), is (in part at least) not new, we discharge the rule on that ground without reference to the publication in Parke's Essays.

We are therefore of opinion that the verdict for the defendant ought to stand, and that the rule to set it aside and enter the verdict for the plaintiff must be discharged.

Rule discharged.

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SMITH and Another v. VOSS.

April, 28.

THE declaration stated that the plaintiffs were possessed of a barge, then lawfully being in the river Thames; and the defendant then had the care, control, and management of a steam vessel, then also being in the said river: yet the defendant, whilst the said barge and steam vessel so were in the said river, took so little and such bad care of the said steam vessel, and governed, directed and navigated the same in the said river in so careless, negligent, and improper a manner, that the same by and through the inere carelessness, negligence, and improper conduct of the defendant in that behalf, then with great force and violence ran foul of, and struck upon and against the said barge of the plaintiffs; and thereby then greatly broke, damaged, and injured the same, &c.

Plea.—Not guilty. Upon which issue was joined.

At the trial before *Pollock*, C. B., at the Middlesex sittings after last Hilary term, the following facts appeared:—A steam vessel called the “Ranger” had left the London Docks for Gravesend under the management of the defendant, who was a licenced pilot. The tide was then running up. The steam vessel proceeded down the river as close to the Surrey shore as practicable, and when

By 14 & 15 Vict. c. 79, s. 27, “Whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel; and the master of any steam vessel navigating any river shall keep as far as is practicable to that side of the fairway or mid-channel thereof which lies on the starboard side of such vessel.” The

17 & 18 Vict. c. 104, ss. 296, 297, contains similar provisions. A steam vessel was proceeding down the river Thames, close to the Surrey shore, under the management of the defendant, a licenced pilot; when she came into collision with the plaintiff's barge which was sailing up the river. In an action for the damage thereby caused.—*Held*, that according to the true meaning of these Acts, it was the duty of the defendant to have kept the steam vessel to the starboard side of, but within, the fairway or mid-channel, and when he saw the risk of collision, to port her helm so as to pass on the port side of the barge, and therefore it was properly left to the jury to say whether, at the time of the collision, the steam vessel was on the starboard side and within the fairway or mid-channel, and, whatever was the position of the steam vessel, whether the collision was caused by the negligence of the defendant or not.

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opposite Rotherhithe she met the plaintiffs' barge coming up the river under sail towards the Surrey shore. The persons on board the steam vessel hailed the barge, but she continued on her course, and came across the bows of the steam vessel, and thereby sustained the damage for which this action was brought. On the part of the plaintiff evidence was adduced to shew that there is a certain part of the river Thames which is known to pilots and others navigating it as the "fairway or mid-channel," and that the steam vessel at the time of the collision was out of the fairway or mid-channel. The plaintiff also adduced evidence as to the then state of the tide, in order to shew that the barge was properly steered towards the Surrey side of the river. The evidence was however conflicting.

It was contended on the part of the defendant, that having kept the steam vessel to the starboard side of the fairway or mid-channel, as required by the 14 & 15 Vict. c. 79, s. 27 (a), he was not liable. The learned Judge told the jury that according to the true construction of that Act, it was the duty of the defendant to have kept the steam vessel to the starboard side of, but within the fairway or mid-channel, and that when he saw there was a risk of a

(a) Sect. 27, "Whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master or other person having charge of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel, due regard being had to the tide and to the position of each vessel with respect to the dangers of the channel, and as regards

sailing vessels, to the keeping of each vessel under command; and the master of any steam vessel navigating any river or narrow channel shall keep as far as is practicable to that side of the fairway or mid-channel thereof which lies on the starboard side of such vessel; and if the master or other person having charge of any steam vessel neglect to observe these regulations or either of them, he shall for every such offence be liable to a penalty not exceeding 50*l*."

collision he ought to have ported her helm, so as to pass on the port side of the barge; and his lordship left it to the jury to say, first, whether the steam vessel, at the time of the collision, was on the starboard side of and within the fairway or mid-channel; secondly, whether there or not, was the collision caused by the negligence of the defendant. The jury found that the steam vessel was not within the fairway or mid-channel, and that, whether within it or not, the defendant was guilty of negligence, whereupon a verdict was entered for the plaintiff, damages 14*l*.

Montagu Chambers, in the present term, obtained a rule nisi to set aside the verdict and for a new trial, on the ground of misdirection^(a). He also obtained the rule on the ground that the verdict was against evidence.

O'Malley (*Petersdorff* with him) now shewed cause.—There was no misdirection. It is clear from the evidence that there is a certain part of the river Thames which is called the fairway or mid-channel. By the 17 & 18 Vict. c. 104, s. 296, "Whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port so as to pass on the port side of each other, and this rule shall be obeyed by all steam ships and by all sailing ships whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger; and subject also to the proviso, that due regard shall be had to the dangers of the

(a) He also obtained the rule on the ground that the verdict was against evidence.

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navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command." By section 297, "Every steam ship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steam ship." Therefore the steam vessel ought to have been in the mid-channel, but as far to the right as practicable. But the steam vessel was out of the fairway or mid-channel and in a part of the river, where persons steering barges would not expect to find her. Though a person driving on the wrong side of the road, would not on that account be necessarily responsible in case of an accident, yet that is an ingredient in considering the question of negligence. Here the jury have found that the defendant was guilty of negligence.

Montagu Chambers and J. Brown, in support of the rule.— Under the 14 & 15 Vict. c. 79, s. 27, it was the duty of the master to keep the steam vessel as far as practicable to the starboard side of the fairway or mid-channel; and having complied with the directions of that Act, he is not responsible. The middle part of the 27th section is not qualified by the previous part, but is separate and distinct. The construction put on the 14 & 15 Vict. c. 79, s. 27, by the learned Judge, is at variance with that of Dr. *Lushington* in the case of the "*Sylph*" (a), who points out that the words in the 9 & 10 Vict. c. 100, s. 9, "Due regard being had to the tide and to the position of each vessel in such tide," are purposely omitted in the 14 & 15 Vict. c. 79, s. 27. According to the finding of the jury, the steam vessel was further to the starboard than it need have been, but the defendant is not responsible, because he has done more than

(a) 2 Eccl. & Adm. Rep. (Spinks) 75.

the Act requires. The term "fairway or mid-channel" only applies to the centre of the river where there are tiers of shipping on the sides, in other cases it means the whole navigable channel. The provisions of the 17 & 18 Vict. c. 104, ss. 296, 297, do not alter the case.

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MARTIN, B.—The rule must be discharged. If the jury had found that the steam vessel was pursuing her course in the position which the Act requires, there might have been some doubt as to the defendant's responsibility; but the jury have found that the steam vessel was not where she ought to have been, and moreover that the defendant was guilty of negligence.

BRAMWELL, B.—I am also of opinion that the rule ought to be discharged. Taking it upon the finding of the jury, that the steamer at the time of the collision, was out of the fairway or mid-channel of the river, it becomes necessary to look at the 17 & 18 Vict. c. 104, and see what rule it lays down. The 297th section, says that "Every steam ship, when navigating any narrow channel shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship." I was inclined to think that if a steam ship was out of the fairway and more to the starboard, she would be in a better position than the Act required and could not be complained of; but on consideration I think that is not so. The Act meant that the steam ship should keep to the starboard of the fairway but within it, and that if she did so she was not to be considered in the wrong: that when out of the fairway to the starboard she would not be necessarily right or wrong. That must be the meaning of the Act, for suppose the master of a steam vessel, in navigating the river Thames, thought fit to go inside the tiers of shipping,

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and there came into collision with a barge; he might say, "I am to the starboard of the fairway;" but the master of the barge might say, "I had no right to expect that you would be there:" so that the former could not be in a better position in consequence of his being more to the starboard than the Act requires. Suppose a steam vessel navigating Southampton water, instead of keeping within the buoys, chose to keep nearer the shore, she would not necessarily be in the wrong, and there would be no presumption that she was in the right. It seems to me, therefore, that the Lord Chief Baron properly left it to the jury to say whether the steam vessel was in the fairway or beyond it, but in my opinion their finding was wrong. The 297th section says, "If in any case of collision it appears to the Court before which the case is tried, that such collision was occasioned by the non-observance, &c., of the foregoing rule as to a steam ship keeping to that side of a narrow channel which lies on the starboard side, the owner of the ship, by which such rule has been infringed, shall not be entitled to recover any recompence whatever for any damage sustained by such ship in such collision, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary." That section does not say "that side of the *fairway or mid-channel* which lies on the starboard side," but "that side of a *narrow channel* which lies on the starboard side:" it therefore tends to shew that the legislature meant by "fairway or mid-channel" the same thing as "narrow channel." In this case, however, the jury have found that there is a fairway or mid-channel as distinct from the channel itself, and in my opinion they are wrong in that finding, because the terms "fairway or mid-channel" mean every navigable part of the river. If a vessel is excluded from navigating a particular part of the river by tiers of shipping, that part would not be the fair-

way or mid-channel within the meaning of the Act. I think that the jury ought to have found that the fairway or mid-channel extends as close to the shore as there is depth of water on ordinary occasions. If the term "fairway or mid-channel" is taken to mean some arbitrary stream of which there is no indication, it would be difficult, if not impossible for persons navigating the river to know how to regulate their course so as to comply with the act of parliament. In my opinion the fairway or mid-channel extends to so much of the river as is commonly navigable, but the jury having found the contrary, we are bound by it. Then there was no misdirection, because the vessel was not in the place where by the Act she was under a special obligation to be. Then comes the question whether the collision was caused by the negligence of the defendant, and the jury have found that it was.

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CHANNELL, B.—The question is, whether there was any misdirection. Irrespective of the statutes there was none. But then the case must be considered with reference to the 14 & 15 Vict. c. 79, the statute cited at the trial, and the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). The latter Act separates into two clauses (296 and 297) the provisions contained in one clause (27) of the former Act; but there is no material difference in the enactments. As however the 14 & 15 Vict. c. 79, was referred to at the trial, it may be more convenient to consider the case with reference to it now. It appears to me that two questions arise, first, what are the circumstances which give the master of a steam vessel protection; and secondly, what is it that creates a liability. The 27th section says, "that the master of any steam vessel navigating any river or narrow channel, shall keep as far as is practicable to that side of the fairway or mid-channel thereof,

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which lies on the starboard side of such vessel." I agree that it was the duty of the Judge to construe that part of the section, and explain to the jury what is meant by keeping "to the starboard side of the fairway or mid-channel, but it was a question for the jury to say whether or no the steam vessel had complied with the provisions of the Act. I think that a proper construction was put on this middle part of the clause and that the question was properly left to the jury, who have come to the same conclusion as I myself should have done. It is said however that the direction is faulty in this respect, that the learned Judge ought to have told the jury that this middle part of the section is not qualified by the previous part, and that as the steam vessel was on the starboard side of the fairway or mid-channel though not within it, the defendant was protected by the Act. But I think that the summing up is not open to that objection, and that the circumstance of the steam vessel being where she was does not afford her any protection, and though she might not, in the case of collision, be necessarily liable to an action, she lost her protection if the finding of the jury is right. Then comes the question as to liability. In order to determine this, it was necessary that the Judge should advert to the first part of the 27th section, which requires the master of any vessel meeting another to port his helm, so as to avoid any risk of a collision, regard being had to the tide and the position of each vessel with respect to the dangers of the channel. The learned Judge did call the attention of the jury to this part of the section when he left to them the question of negligence. For these reasons I think that the rule should be discharged.

POLLOCK, C. B.—I agree that the rule ought to be discharged.

Rule discharged.

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BISS AND WIFE v. SMITH.

May 8.

THIS was an action of ejectment to recover possession of certain lands in the parish of Berkeley. By consent and order of a Judge the following case was stated for the opinion of the Court.—

Anthony Wiltshire at the time of the making of his will, and thenceforward down to the time of his death, was seized in fee simple in possession of certain freehold land. On the 30th June, 1818, he made his will, and thereby, (after certain specific and pecuniary bequests, and a specific devise to the eldest son of his niece Elizabeth Taylor, and the heirs of such eldest son, provided such son should pay to each of his brothers the sum of money therein mentioned,) gave and devised the residue of his real and personal estate to the plaintiff Elizabeth Biss (in the said will called Elizabeth Wiltshire), in the words following.

“I give, devise and bequeath unto my niece Elizabeth Wiltshire all and singular the rest, residue and remainder of my real and personal estate and effects of what nature, sort or kind soever, and wheresoever situate and being at the time of my decease, to hold to her the said Elizabeth Wiltshire, and to her heirs and assigns for ever: provided nevertheless, and my will and meaning is, and I do hereby direct, that in case my said niece, Elizabeth Wiltshire, shall die without lawful issue born of her body and living at the time of her decease, then the above mentioned real and personal estate with the appurtenances so given and devised

A testator by a codicil, (made before the 1st January, 1838) which he desired should be considered as annexed to and taken as part of his will, devised certain freehold land to P., to hold to P., her heirs and assigns for ever: Provided that in case she should depart this life without leaving lawful issue of her body, then he gave and devised the same in manner and form by him given and devised by his will. By his will he had devised the said land to W. to hold to W., her heirs and assigns for ever: Provided, nevertheless, that in case W. should die without lawful issue living at the time of her decease, then the residue should go to and be possessed by P., her heirs and as-

signs for ever: Provided also, that in case W. and P. should both die without leaving issue lawfully born of their bodies, then the said land should go to the daughters of R. and F., and their heirs.—*Held*, that by the codicil P. took an estate tail.

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to the said Elizabeth Wiltshire shall go to and be possessed by her sister, my niece Mary Platt, and to her heirs and assigns for ever: provided also, and my will and meaning is, and I do hereby further desire, that in case my said nieces, Elizabeth Wiltshire and Mary Platt, shall both die without leaving issue lawfully born of their bodies, then the same estate, with the appurtenances, shall go unto and amongst all my other nieces, the daughters of Elizabeth Reed, and the daughter of Hester Fowler, and to their heirs and assigns for ever, equally to be divided between them share and share alike, as tenants in common, and not as joint tenants."

On the 2nd of January, 1819, Anthony Wiltshire made a codicil to his will in the words following:—"This is a codicil to the last will and testament of me Anthony Wiltshire, of, &c., bearing date, &c., which I desire may be considered as annexed to and be taken as part thereof; I give and devise unto my niece, Mary Platt, all that my freehold estate, called Heathfield, situate, &c. I also give and devise unto my said niece, the said Mary Platt, certain pieces of land and a cottage (describing them), to hold the said estate, cottage, lands, &c., unto and to the only proper use and behoof of my said niece Mary Platt, her heirs and assigns for ever; provided nevertheless, that in case the said Mary Platt shall depart this life without leaving lawful issue of her body, then I give and devise the said estate, cottages, &c., in manner and form by me given and devised in and by my said in part recited will."

The lands and hereditaments so devised to Mary Platt by the codicil are the lands sought to be recovered in this action. In the month of January, 1819, the testator died without having altered or revoked his will, save in so far as the same is altered by the said codicil, and without having altered or revoked the

codicil, and thereupon Mary Platt, as devisee under the codicil, entered into possession of the lands devised to her. She remained in possession down to the time of her death.

By indenture dated the 1st of May, 1823, made between Mary Platt of the first part, William Read King of the second part, and Thomas Edwards of the third part, it was witnessed that for barring all estates tail and all reversions and remainders thereon expectant, &c., and for assuring the said lands in fee simple to the use of Mary Platt, she did grant, bargain and sell all the said lands and hereditaments, &c., devised to her by the said codicil unto W. R. King and his heirs and assigns: To the intent that he might become a tenant of the immediate freehold of the said lands and hereditaments, &c., to the end that a common recovery might thereof be had and suffered; and by the same indenture it was declared that, after suffering the said common recovery the same should enure to the use of Mary Platt, her heirs and assigns for ever.

The recovery was afterwards duly suffered in the Court of Common Pleas at Westminster.

On the 18th of September, 1829, Mary Platt made her will, and she subsequently made four several codicils thereto, and by the third of such codicils, bearing date the 7th of January, 1845, devised the said lands to the defendant in fee simple.

On the 24th day of June, 1854, Mary Platt died a widow, and without leaving lawful issue of her body, and without having altered or revoked the devise to the defendant contained in the codicil of the 7th of January, 1845, and on her death the defendant entered into possession of the lands and hereditaments so devised to him, and he is now in such possession.

The plaintiff, Charles Biss, is the husband of Elizabeth Biss.

The question for the opinion of the Court is, whether

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Mrs. Platt, by suffering a recovery in 1823, acquired the fee in the lands and hereditaments in dispute, so as to enable her to devise the property to the defendant in fee. If the Court shall be of opinion in the negative of the question, then judgment for the recovery of the said lands and hereditaments shall be entered for the plaintiffs. If the Court shall be of opinion in the affirmative of the question, then judgment shall be entered up for the defendant.

M. Smith (with whom was *Gray*), argued for the plaintiffs (a).—It is conceded, that if in a will made before the 1st January, 1838, there is a devise of realty to one and his heirs, “and if he die without leaving lawful issue” then a gift over, the words are to be construed as referring to an indefinite failure of issue: therefore an estate tail is created by the codicil unless the remainder of the will shews that such was not the intention of the testator. The rule as stated by Lord *Kenyon* in *Roe d. Sheers v. Jeffery* (b) applies here. “The question in this and similar cases is, whether from the whole context of the will we can collect that the testator meant dying without issue living at the death of the first taker?” Here the testator by his will devised his real estate, including the land in question, to Elizabeth Wiltshire, and in case she should “die without issue born of her body and living at the time of her decease,” then to Mary Platt and her heirs. He goes on to say, “I desire that in case Elizabeth Wiltshire and Mary Platt both die without leaving issue lawfully born of their bodies,” then the estate shall go over. It is clear that, by the will, the testator intended to give the same estates to both nieces, viz., estates in fee, with executory devises

(a) April 29. Before *Pollock*,
C. B., *Martin*, B., *Bramwell*, B.,

and *Channell*, B.
(b) 7 T. R. 589.

over. Then by the codicil, which he desires may be considered "as annexed to his will and taken as part thereof," he says, "I devise" the land in question "to Mary Platt and her heirs, and in case she shall depart this life without leaving lawful issue of her body, then I give and devise the said estate in manner and form by me given and devised by my said will." By the codicil the testator has merely put Mary Platt in the place of Elizabeth Wiltshire. The intention was to give her an estate in fee, with an executory devise over, such as was given by similar words in the will. In *Sheppard v. Lessingham* (a) the testatrix bequeathed certain bank stock to her daughter for life, with remainder to such child or children of her as should be living at her death, and if she should not leave any child, or if all children should die without issue, then to J. S. The daughter had a son born at the time of making the will. The Court held that they would, if possible, so construe the words "dying without issue" as to support the limitation over; and reading them with reference to the prior clause, held that they meant "without leaving issue at the death of such children." This case comes within the class of cases where other expressions in the will, added to words importing a failure of issue, shew that the testator used the words in a restricted sense. The cases on the subject will be found in 2 Jarman on Wills, p. 434 (b). In Prior on the Construction of Limitations, in which the words "issue" and "child" occur, p. 90., it is said, "Another class of cases comprises those in which there has been in the preceding part of the will a devise over on failure of issue, which (either by plain language or by some of the rules I have laid down) is considered as depending on a failure at some limited period, and the testator afterwards introduces another gift by an expression, which by itself would import

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(a) Amb. 122.

(b) 2nd edition.

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that such latter gift was only to take effect on an indefinite failure of issue: he is sometimes, in such cases, considered as intending to express by a short form what he has before declared at length, and the restricted instead of the indefinite meaning is given to the words." In *Kirkpatrick v. Kulpatrik* (a), and *Radford v. Radford* (b), a similar rule of construction was applied. In *Greenwood v. Verdon* (c), under a devise of real estate to "A. and his heirs and assigns for ever, and from and after his decease without issue to be equally divided among the then surviving legatees, share and share alike;" it was held that the gift over must be taken to refer not to an indefinite failure of issue, but to a failure of issue to take place within the lives of the executory devisees. Vice Chancellor *Page Wood*, in delivering judgment, said, the question was whether or not there was sufficient on the face of the will to indicate that the failure of issue referred to was a failure which was to take place at a certain definite period, and not a general failure of issue; and in coming to the conclusion that there was such an indication, he relied on the fact that it was apparent on the face of the will that the testator intended to give a personal benefit, and not a transmissible interest, to those to whom the estate was limited in default of issue.

Hugh Hill (with whom was *Raymond*), for the defendant.—In construing wills, where there is a fixed rule of law for the construction of certain expressions, great confusion, uncertainty and inconvenience are caused by attempts to follow the meaning of a testator in a particular instance: it is safer to adhere to the known and settled meaning of the words. Now, it has long been established that the words "dying without leaving lawful issue," in a

(a) 13 Ves. 476.

(b) 1 Keen, 486.

(c) 1 Kay & J. 74.

devise of real estate, mean an indefinite failure of issue; but in a bequest of personalty, they mean "dying without leaving issue living at the death of the first taker." The cases were considered and explained in *Bamford v. Lord* (a), and *Doe d. Simpson v. Simpson* (b). In *Doe d. Cadogan v. Ewart* (c), *Doe d. Todd v. Duesbury* (d) and *Cole v. Goble* (e), the rule as first laid down in *Forth v. Chapman* (f) was adopted; and the doctrine of Lord Kenyon in *Porter v. Bradley* (g) was disapproved of. There is an exceptional case, where the context shews that the devise over is to take effect upon the death of the first taker, such as where the words are "without leaving issue behind him." So, perhaps, as in *Greenwood v. Verdon* (h), where the gift over was of life estates to certain legatees who would not have been benefited, unless the words were construed to mean on "failure of issue at the death of the first taker." The plaintiff seeks to supply the words "living at the time of her decease," but words can only be changed or transposed where the intention of the testator cannot otherwise be carried into effect, as where the words taken in the order in which they stand do not convey any meaning, as in *Doe d. Wolfe v. Allcock* (i), cited 1 Jarman on Wills, p. 418.

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M. Smith replied.

PER CURIAM.—It is not at all clear that the plaintiffs are entitled to this property even if the defendant has no title.

Cur. adv. vult.

(a) 14 C. B. 708.

(b) 4 Bing. N. C. 333.

(c) 7 A. & E. 636.

(d) 8 M. & W. 514.

(e) 13 C. B. 445.

(f) 1 P. Wms. 663.

(g) 3 T. R. 143.

(h) 1 Kay & J. 74.

(i) 1 B. & Ald. 137.

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The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a special case for the opinion of the Court and the only question is, whether one Mary Platt, by suffering a common recovery of certain lands sought to be recovered in this action of ejectment, acquired the fee simple, which turns upon whether she had an estate tail. Mary Platt claimed under a codicil to the will of one Anthony Wiltshire made on the 2nd of January, 1819, which, after reciting his will bearing date the 30th June then last, and declaring his desire that the codicil might be considered as annexed to and be taken as part thereof, gave and devised unto Mary Platt certain freehold lands, part of the residue of his property devised by his will, unto and to the only proper use and behoof of the said Mary Platt, her heirs and assigns for ever: Provided, nevertheless, that in case the said Mary Platt should depart this life without leaving lawful issue of her body, then he gave and devised the same in manner and form by him given and devised in and by his said recited will. By his will he had devised the residue thus:—"I give, devise and bequeath unto Elizabeth Wiltshire all the residue, &c. to hold to her the said Elizabeth Wiltshire and to her heirs and assigns for ever: Provided, nevertheless, and my will is, &c., that in case the said Elizabeth Wiltshire should die without lawful issue born of her body and living at the time of her decease, then the said residue should go to and be possessed by the said Mary Platt, her heirs and assigns for ever: Provided also, and my will is, &c., that in case the said Elizabeth Wiltshire and Mary Platt should both die without leaving issue lawfully born of their bodies, then the said residue should go unto and amongst all the daughters of Elizabeth Reed and the daughter of Hester Fowler, and to their

heirs and assigns for ever, share and share alike, as tenants in common and not as joint tenants." Mary Platt suffered a common recovery in order to obtain the fee simple, and the question is, whether a devise by her is valid as against a party claiming under the will.

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The plaintiffs in the ejectment are Elizabeth Wiltshire, now Mrs. Biss, and her husband, but we decline to give any opinion whether she would have been entitled to the property assuming Mary Platt had not acquired the fee simple by the recovery. It was admitted, in the argument on behalf of the plaintiffs, that the devise by the codicil, of itself, viz. to Mary Platt and her heirs, and provided she should depart this life without leaving issue of her body then over, would have given her an estate tail. It was said, and said truly, that whatever might have been the case if the question were new, these words as applied to realty had by a series of decisions been conclusively decided to give such estate in all wills made anterior to the 1st January, 1838; a legislative meaning being imposed upon such words in all wills made subsequently by the statute 7 Wm. 4 & 1 Vict. c. 26, s. 29. But it was argued that, coupled with the words in the will, the devise to Mary Platt in the codicil was to be construed as giving her a fee simple with a conditional limitation over upon her dying without issue living at the time of her death. It was argued that this was clearly the meaning of the devise in the will to Elizabeth Wiltshire, and that the same meaning ought to be given to the devise therein to Mary Platt, although the words used were "in case Elizabeth Wiltshire and Mary Platt should both die without leaving issue," which of themselves would give an estate tail. However this may be, we do not feel ourselves at liberty to depart from the construction which has been long given to the words used in the codicil. They clearly of themselves give an estate to Mary Platt

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and the heirs of her body, and the limitation or limitations over are after the determination of that estate. We do not think ourselves authorized to alter or cut down the estate by reason of the words in the will, even supposing it was certain that Mary Platt did not under the will take an estate tail. In our opinion, therefore, Mary Platt took an estate tail, and it is the legal consequence that, by suffering this recovery, she was enabled to devise the property to the defendant in fee. Judgment is therefore to be entered for the defendant.

Judgment for defendant.

May 7.

ATTERBURY and Others v. JARVIE.

To an action for money lent (the defendant being under terms of trying at the ensuing sittings), the Court refused to allow him to plead, as a defence on equitable grounds,

THIS was an action for money lent, to which the defendant proposed to plead (*inter alia*) the following pleas as defences on equitable grounds.

First.—As to 10,000*l.* parcel, &c. : that the claim of the plaintiffs, so far as the same relates to the said sum of 10,000*l.*, was and is wholly in respect of monies from time to time advanced by the plaintiffs to the defendant upon security of goods consigned by the defendant to the plaintiffs : that at the time of such advancing it was agreed between the plaintiffs and defendant, that the plaintiffs should cause the goods so consigned to be sold on account of the defendant for the best prices which could be got for the same, and out of the proceeds retain the amount of the monies so advanced : that the plaintiffs might have sold the goods for prices more than sufficient to reimburse them the monies so advanced, but the plaintiffs wrongfully and in violation of the agreement sold the goods for prices less than the best prices which might have been got for the same, and by reason of such wrongful act the plaintiffs were prevented from reimbursing themselves the amount of the monies so advanced out of the proceeds of the sales.—Secondly, as to the sum of 5,400*l.* parcel, &c., that the defendant consigned to the plaintiffs divers goods, to be by the plaintiffs sold at New York for certain commission to the plaintiffs on that behalf, at prices not less than the best market price : that the plaintiffs not regarding their duty in that behalf wrongfully sold the goods for prices less than the best market price, whereby the defendant sustained losses amounting to 5,400*l.* : that afterwards it was agreed between the plaintiffs and defendant that they should set-off the amount of such losses against so much money as might be due from the defendant to the plaintiffs : that the amount of such losses is equal to the said sum of 5,400*l.* parcel, &c., which was due from the defendant to the plaintiffs : that the defendant has always been ready and willing to set off the amount of such losses against the said sum of 5,400*l.* parcel, &c.

Quære : Whether the subject-matter of the pleas afforded any defence on equitable grounds.

to time lent and advanced by the plaintiffs to the defendant, upon security of certain goods of the defendant of greater value and amount than the monies so lent and advanced, before and at the time of every such lending and advancing by the plaintiffs, and from time to time consigned by the defendant to the plaintiffs: that at the time of every such lending and advancing by the plaintiffs to the defendant, it was agreed by and between the plaintiffs and the defendant, and every such consignment of goods was made upon the terms, that the plaintiffs should within a reasonable time in that behalf then next ensuing every such consignment of goods, cause the said several goods so consigned to be sold for and on account of the defendant for the best prices which might then, at such respective times, be reasonably got for the same, and should by and out of the proceeds to arise and be obtained by such sales retain to and reimburse themselves the amount of the several monies so lent and advanced by them to the defendant: that the plaintiffs might from time to time, and within a reasonable time in that behalf next after the making of every such consignment of goods, have sold the goods consigned to them for prices of greater amount than and sufficient to satisfy and reimburse the plaintiffs the amount of the several monies so from time to time lent and advanced by them to the defendant on such goods respectively; but the plaintiffs wrongfully, and in violation of the said agreement and for their own purposes, from time to time sold the goods so consigned to them for prices less than the best prices which might, within such reasonable time respectively in that behalf next ensuing every such consignment, have been reasonably got for the same, and by reason of such wrongful act of the plaintiffs, and not otherwise, the plaintiffs were prevented from reimbursing themselves the amount of the several monies so lent and advanced by them out of the

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proceeds which arose from the sales of the said goods so consigned to them as aforesaid.

Secondly.—As to the sum of 5,400*l.* parcel, &c.: that, before action, the defendant consigned from time to time to the plaintiffs, and the plaintiffs then from time to time accepted and received from the defendant, divers goods of great value, to wit of the value of 10,000*l.*, to be by the plaintiffs from time to time sold and disposed of at New York in the United States of America, for certain commission and reward to the plaintiffs in that behalf, at prices not less than the best market price for the same respectively: that the plaintiffs, not regarding their duty in that behalf, from time to time wrongfully sold and disposed of the said goods for prices less than the best market prices for the same respectively, whereby the defendant, before action, sustained divers great losses, amounting to a large sum of money, to wit the sum of 5,400*l.*: that afterwards and before action, it was agreed by and between the plaintiffs and defendant that they should mutually set off and allow the amount of such losses so sustained by the defendant against so much of the money which, upon the taking and settling the accounts between the plaintiffs and defendant, might be due and owing from the defendant to the plaintiffs, as the amount of such losses should be equal to.—Averments: That the amount of such losses is in amount equal to the said sum of 5,400*l.*, parcel, &c., which said sum of 5,400*l.* was and is a sum which upon the taking and settling of the accounts between the plaintiffs and the defendant was found due and owing from defendant to the plaintiffs: that the defendant has always since the making of the said agreement hitherto been and still is ready and willing to set off and allow the amount of such losses which the defendant has sustained against the said sum of 5,400*l.*, parcel, &c.

Application had been made to a Judge at Chambers, who refused to allow these pleas, whereupon the present rule was obtained for leave to plead those with other matters. There was no affidavit of the truth of the pleas.

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Milward now shewed cause.—The matter stated in these pleas does not afford any equitable defence; but is merely ground for an action for negligence. The second plea is similar to that in *Stimson v. Hall* (a), where the defendant pleaded, by way of equitable defence, that the plaintiff's claim was for work done by him as a lighterman; that in the course of such employment the plaintiff agreed to convey on a certain river a quantity of coal of the defendants; that the coal was utterly lost through the negligence and improper conduct of the plaintiff, and that the cost price of the coal so lost was 47*l.* 0*s.* 6*d.*, which the defendants claim equitably to set off against the sum pleaded to, and say that the said sums are equal in amount: and on demurrer, it was held that the subject-matter of the plea could not be pleaded by way of equitable defence, but merely afforded ground for a cross-action. The Court there pointed out the distinction between that case and *Beasley v. Darcy* (b), where a landlord, having brought ejectment against his tenant for nonpayment of rent, the tenant was allowed to set off a claim against the landlord for unliquidated damage, by reason of a trespass committed on the land. [*Pollock*, C. B.—Suppose this had been the case of a pledge upon which the plaintiff had advanced money, and the defendant sued for an injury to the pledge, could the plaintiff set off, against the damages, the amount advanced? *Martin*, B.—The only analogous case is that of a set-off of judgments; and in *Archbold's Practice*, p. 663, 9th ed., it is said: "The judgment offered to be set off

(a) 1 H. & N. 831.

(b) 2 Scho. & Lef. 403, note.

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must in general be actually in existence at the time of making the application, for the Court will not allow costs to which a party may probably be entitled in one action to be set off against costs to which he is absolutely liable in another. Therefore the amount of a verdict, on which a rule for a new trial is pending, cannot be set off against the amount of a judgment." *Bramwell*, B.—Could the defendant go to a Court of equity and obtain an injunction absolute to stay the action? If not these pleas cannot be allowed.] On a bill for redemption of mortgaged property in the possession of the mortgagee, the latter will be made to account for all loss and damage occasioned by his gross negligence in respect of bad cultivation and non-repair of the mortgaged premises: *Wragg v. Denham* (a); but that has no application to this case, which is an attempt to set off unliquidated damage against a debt. A Court of equity would only decree relief conditional on payment into Court of the money due. Moreover the defendant is under terms of taking short notice of trial, and if these pleas be allowed it will be necessary to send a commission to New York.

Hugh Hill and *Paterson*, in support of the rule.—Although there is no express authority in point, it is submitted that a Court of equity would in this case grant unconditional relief. If there be a course of dealing between two parties which results in a debt and cross-claim for unliquidated damages, a Court of equity will allow the latter to be set off against the former. [*Bramwell*, B.—In *Phillimore on Jurisprudence*, p. 233, there is this comment on the maxim, "Dolo facit qui petit quod redditurus est:"—"This is the rule which Lord *Mansfield* endeavoured to establish, and which, after his death, was immediately overthrown by the narrow-minded men to

(a) 2 Y. & Col. 117.

whom the office of Judge was confided. 'I never will allow, said that Judge, who vainly tried to introduce something like order and principle in the chaos of our truly barbarous jurisprudence, the trustee to set up his right against the cestui que trust.' This drew down upon him the denunciations of Lord *Eldon*, who took care that the old system so hideously favourable to the most odious pettifogging and extortion, so ruinous to all but the most opulent suitors, and so oppressive even to them should be upheld in all its deformity." In cases where a party has some equitable ground for resisting his adversary's demand, Courts of equity have allowed an equitable set-off, when no set-off could be had at law. In *Jones v. Moore* (a), certain consignments of oil were made from Columbo to certain persons resident in England. During the voyage several of the casks in which the oil was contained leaked. Some part of the oil which so escaped was wholly lost, but the greater part was collected together and sold in one mass by the captain, in the course of the voyage, for 750*l*. The consignees then agreed to share the proceeds in proportion to their respective losses. An action having been brought by the shipowners against an individual consignee for freight and average, it was held that the latter could not set off his share (as ascertained by the agreement) of the monies arising from the oil sold; consequently that he could maintain a bill in equity to establish a right of equitable set-off. *Clerk v. Court* (b) establishes the same principle. Courts of equity have even given a party the benefit of a legal set-off, where, in point of form, he could not avail himself of it at law: *Williams v. Davies* (c). This principle of equity is not confined to mere debts, but extends to cases of unliquidated damages: *Beasley v.*

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(a) 4 Y. & C. 351.

Jones v. Moore, 4 Y. & C. 351.

(b) Not reported: cited in

(c) 2 Sim. 461.

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Darcy (a), Piggott v. Williams (b). Unless these pleas be allowed, the defendant must resort to a Court of equity; and that Court would direct an issue at law to ascertain the damages; therefore the very inconvenience will ensue which it was the object of the statute to prevent.

POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. If the defendant has any claim for damages of the nature alleged, that is only the subject of a cross action. Besides, as the defendant is under terms to take short notice of trial, we ought not to allow pleas the effect of which would be to render a commission necessary.

MARTIN, B.—I am of the same opinion. Under the particular circumstances of this case, it is clear that the defendant ought not to be allowed these pleas. But what presses on my mind with respect to the pleas themselves, is, that to the knowledge of counsel, engaged in advising on mercantile transactions, no instance can be found in which a Court of equity has interfered in a case like the present. The plaintiffs sue for advances made on goods consigned to them for sale, and the defendant pleads that the plaintiffs were guilty of misconduct in the sale of the goods whereby the defendant sustained certain damage, which he claims to set off against the plaintiffs' demand; and we are asked to assume, though no case to that effect can be found, that a Court of equity would, under such circumstances, allow an equitable set-off. I cannot believe that any such equitable right of set off exists. Where a person advances money, if there is no stipulated time for repayment, he may sue instantly for the money: and it would be monstrous to tie up his hands by a claim for damages, which is only the subject of a cross-action.

(a) 2 Scho. & Lef. 403, note.

(b) 6 Madd. 95.

BRAMWELL, B.—I doubt whether the pleas are good, but at all events there is no instance in which a Court of equity has granted an injunction to stay an action under circumstances like these. If the only question was whether the pleas are good or bad, I should wish for time to decide that matter, and should say that they ought to be pleaded in order that the point might be discussed. Suppose, however, that this matter might be the subject of an injunction in a Court of equity; and that upon a bill filed, and affidavit in support of it, an injunction would be granted until the answer came in, still it would only be granted upon payment of the money into Court, and when the answer was put in and the motion made to dissolve the injunction, the Court would have all the facts before it, and so be enabled to exercise a discretion as to whether it ought to be absolute, and if so, upon what terms. Therefore, before we allow these pleas, we ought to have all the materials before us to enable us to exercise a discretion. But no matter is brought before us, except that the defendant is under terms to try at the next sittings, and if these pleas were allowed they would operate as an injunction absolute without any of those terms which a Court of equity would impose. Therefore, assuming that the pleas are good, it seems to me that we ought not to allow them, more especially as the defendant has a remedy by cross-action.

CHANNELL, B.—I am not satisfied that these pleas constitute a good defence on equitable grounds, and if the defendant were not under terms, it might be advisable to allow them to be pleaded in order that the matter might be discussed. But this is an appeal from the decision of a Judge, on an application, in substance, for leave to plead these with other pleas. That is a matter for the discretion

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of the Court; and the defendant being under terms, in my opinion we exercise a wise discretion in not permitting them to be pleaded.

Rule discharged.

HENRY COOPER and SARAH COOPER, Executor and
 Executrix of W. COOPER, v. EDWIN WOOLFITT.

May 4.

A testator devised to W. certain land called the "Clay pits," and bequeathed to C. and W. all his monies, &c., personal estate and effects whatsoever and wheresoever, not therein specifically bequeathed. There was no specific bequest of crops growing on the land. — *Held*, that the devisee of the land was entitled to the emblements growing upon it at the time of the testator's decease.

THE declaration alleged that W. Cooper, in his lifetime and at the time of his death, was seized in fee of certain land called the "Clay pits," and being so seized sowed the same with a crop of corn and barley, which was growing thereon at the time of his death; and that at the time of the committing of the grievances hereinafter mentioned, the plaintiffs, as executors, were entitled to the said crop of corn and barley, which was then growing on the said land, and to a right of way, &c., for the purpose of cutting and carrying away the said crop of corn and barley; that the crop was ripe and ready to be cut; yet the defendant obstructed the said way, and prevented the plaintiffs from entering and carrying away the said corn, &c.

Plea.—That W. Cooper, by his last will, devised the said land, called the "Clay pits," unto one M. Woolfitt, to hold the same to the use of M. Woolfitt, her heirs and assigns for ever, whereby M. Woolfitt became seized of the said land called the "Clay pits," and entitled to the crop of corn and barley growing thereon; and that M. Woolfitt being so seized and so entitled to the said crop of corn and barley, the defendant, as the servant of M. Woolfitt, committed the supposed grievances.

Replication.—That W. Cooper, by his will, gave and devised the said land to M. Woolfitt, chargeable, nevertheless, with the payment of a legacy of 20*l.* thereafter

bequeathed to Samuel Cooper, to hold the same, chargeable as aforesaid, unto and to the use of M. Woolfitt, her heirs and assigns for ever. And, by his will, he gave and bequeathed to M. Woolfitt and Sarah Cooper, in equal shares, all his monies, securities for money, household furniture, goods, chattels, personal estate and effects whatsoever and wheresoever *not thereinbefore specifically bequeathed*; and by a codicil to his said will, duly executed, &c., he revoked the said bequest, in favour of the said M. Woolfitt, of one half part of the residue of his personal estate and effects, and bequeathed such one half part to the plaintiff, Henry Cooper, and afterwards died without altering his said will and codicil as to the said bequest, and that the corn and barley in the declaration mentioned was not specifically bequeathed by the will or codicil, or otherwise.

The defendant demurred to the replication. He also rejoined:—That W. Cooper, by his said will, bequeathed to the said Samuel Cooper the legacy of 20*l.*, to be payable at the end of twelve calendar months next after his decease, by M. Woolfitt, out of the close of land called “Clay pits,” &c. And he also bequeathed unto Joseph Cooper absolutely, all that his post windmill, with the sails, gear and appurtenances; and that the said W. Cooper, by his said will, gave and bequeathed unto M. Woolfitt and the plaintiff, Sarah Cooper, in equal shares, all his monies, securities for money, household furniture, goods, chattels, personal estate and effects whatsoever and wheresoever not therein before specifically bequeathed, subject to the payment of all his just debts, his funeral and testamentary expences, as well as to the payment of legacies of 20*l.* apiece unto James Cooper and E. Cooper, and he appointed them, the said M. Woolfitt and Sarah Cooper, joint executrixes of his said will; and that the said W. Cooper, by his said codicil, charged his aforesaid mill and appurtenances bequeathed to the said

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Joseph Cooper with the payment of the said two legacies of 20*l.* apiece to the said James Cooper and E. Cooper, in exoneration of his residuary personal estate, and he appointed the plaintiff, Henry Cooper, joint executor with the said Sarah Cooper of his will.

The plaintiff demurred to the rejoinder.

Bittleston, for the defendant.—As between the executor and the devisee of a tenant in fee, the devisee is entitled to growing crops as appurtenant to the land. The rule is thus stated in *Williams on Executors*, p. 634 :—"The executor of a tenant in fee does not enjoy the right to emblements as against a devisee; for if the land itself is devised the growing crops pass to the devisee, and the executor is excluded. This rule is founded on the presumption that it is the will of the testator that he who takes the land should take the crops which belong to it, because every man's donation shall be taken most strongly against himself." (a) The presumption may be rebutted by words in the will shewing an intent that the executor shall have the emblements. Here, however, there are no words specifically giving to the executors property of the nature of growing crops. A general gift of the personalty to an executor has not that effect, because it gives him no more than the law would give him. Here there is nothing to shew that the testator intended, by the general words, to include the emblements. In *Vaisey v. Reynolds* (b) it was held that a gift of all farming stock would not, as against the devisee, pass crops in the ground; and the Master of the Rolls, commenting upon *Cox v. Godsalue* (c) and *West v. Moore* (d), says, that in those cases the intention

(a) 5th Ed. Citing *Spencer's Case*, Winch. 51; Gilb. Ev. 214, 215.

(b) 5 Russ. 12.
 (c) 6 East, 604, n.
 (d) 8 East, 339.

that the executor should have the growing crops seems to have been inferred rather because the executor was plainly meant to take the whole personal estate, than from the mere force of the words "stock of my farm" or "stock upon my farm." But it is clear that that opinion is not well founded. On referring to the judgment in the case of *West v. Moore* (a) it appears that Lord *Ellenborough* thought that the words "stock upon my farm" were necessary to pass the emblements to the executor. *Rudge v. Winnall* (b) is a decision in accordance with *West v. Moore*. The right of an executor to emblements is founded on the notion that he who sows shall reap; and therefore the executor, as the representative of a deceased tenant in fee, takes as against the heir. But a devisee represents the testator just as much as an executor does.

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Joseph Brown, for the plaintiff.—The replication shews that the testator bequeathed to Henry Cooper and Sarah Cooper all his personal estate "not thereinbefore specifically bequeathed." There is no previous specific bequest of these emblements; therefore they passed to the executors by these words. [*Pollock*, C. B.—Emblements pass by a devise of the land, partly because, being a grant, the devise must be taken most strongly against the grantor. If the point was new, it might perhaps be argued that the devisee as "hæres factus" would not take more than the heir would; but it has long since been determined that a devise is not the mere substitution of one person for another as heir, but operates as a conveyance.] The case cited in *Williams* on Executors, from Roll. Ab. 727, pl. 18, might apply if there was a devise of the land and no bequest in the will, the terms of which could include the emblements. But

(a) 8 East, 339.

(b) 12 Beav. 357. See also *Blake v. Gibbs*, 5 Russ. 13, n.

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Cox v. Godsalve (a) and *West v. Moore* (b), as explained by Sir John Leach in *Vaisey v. Reynolds* (c), shew that the words here used have that effect. There being a clear bequest of the whole personal estate to the executors, that is a sufficient indication of the testator's intention to give to them the growing crops.

POLLOCK, C. B.—The question is, whether, under the large words employed by the testator in the bequest of personalty, the growing crops are so clearly given to the legatee as to take them out of the operation of the rule of law which, in case of a devise of the ground on which the crops stand, gives them to the devisee. A devisee takes more than the heir would have done; for he is not “*hæres factus*,” but takes by conveyance. He is therefore entitled to everything which is appurtenant to the land, and as such to all crops growing on the land at the time of the testator's decease, unless it appears with certainty that the testator intended some one else to take them. Here it is impossible to say that it is clear that the testator intended to give these crops to the executors. I am therefore of opinion that there must be judgment for the defendant.

MARTIN, B.—I am of the same opinion. The replication shews that the testator having given to M. Woolfitt the close called “the Clay pits,” bequeathed to H. Cooper and S. Cooper all his personal estate whatsoever and wheresoever not thereinbefore specifically bequeathed. It is said that this applies to the crops growing on the land in question. But according to the well established rule, they go to the devisee of the land unless expressly given by the will to some one else.

(a) 6 East, 604, n.

(b) 8 East, 389.

(c) 5 Russ. 12.

BRANWELL, B.—I am of the same opinion. It is said that the general bequest of the personal estate, not therein before specifically bequeathed, shews that the emblements were not to go to the devisee of the land. But, in fact, this amounts to nothing, because in every case where an executor is appointed all the personal effects vest in him.

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CHANNELL, B.—I am of opinion that the defendant is entitled to judgment upon each of the demurrers. The law is thus stated in Sheppard's Touchstone, by Preston, p. 472:—"As between an executor and devisee the emblements belong to the devisee, unless they are expressly bequeathed." Here there is nothing either in the will or the codicil to cut down the effect of the devise to M. Woolfitt.

Judgment for the defendant.

LOMAX v. BERRY.

May 8.

JOYCE had obtained a rule calling on the plaintiff to shew cause why an order of Channell, B., that the plaintiff recover his costs of suit, should not be rescinded.

An order that the plaintiff recover his costs in an action on a judgment, under the 43 Geo. 3, c. 46, s. 4, cannot be made by a judge at chambers, except upon a summons to shew cause.

The action was on a judgment recovered in this Court for the sum of 25*l*. Judgment was signed for want of a plea. On an application made *ex parte*, and without any notice thereof to the defendant or his attorney, the plaintiff had obtained the order in question, made by the learned Judge under the 43 Geo. 3, c. 46, s. 4. A summons was then taken out by the defendant's attorney calling on the plaintiff to shew cause why this order should not be set aside, when the learned Judge stayed the pro-

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ceedings to enable the parties to apply to this Court, in order that the question whether such orders could be made by a Judge at chambers, *ex parte*, might be settled.

Barnard shewed cause.—The practice at chambers has been to make orders, under the section in question, on *ex parte* applications. The cases in which a defendant is subjected to costs in an action on a judgment are where the defendant has no goods, and it is necessary to bring an action on the judgment in order to enable the plaintiff to take the person of his debtor; or where the defendant pleads a false plea of *nul tiel record*. It is a convenient and inexpensive practice to make the orders *ex parte*. In all cases where any false affidavit is used the order may be set aside.

Joyce, in support of the rule.—The order cannot be made *ex parte*. *Revell v. Wetherell* (a) shews that a rule for costs under this statute is a rule *nisi*; and *Fraser v. Moses* (b) is to the same effect. In Archbold's Practice, p. 459, 9th ed., it is said that an application for this purpose to a judge at Chambers must be made on a summons to shew cause. [*Martin, B.*—A similar question, arising under the county court Acts, was recently discussed between myself and my brothers *Crompton* and *Willes* at chambers, and we arrived at the conclusion that it was a matter of principle that a summons must issue before a hostile order for costs could be made.]

Per CURIAM.—The rule must be absolute to rescind the order.

Rule absolute.

(a) 3 C. B. 321.

(b) 4 Scott, N. S. 749; S. C. 1 D. N. S. 705.

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THE GOVERNOR AND COMPANY OF THE NEW RIVER,
brought from CHADWELL and AMWELL to LONDON, v.
THE COMMISSIONERS OF LAND TAX for the Division of
HERTFORD in the County of HERTFORD.

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A RULE had been obtained in this Court on the part of the Governor and Company of the New River, under the 1 & 2 Vict. c. 58, s. 2, calling upon the Commissioners of Land Tax for the division in the county of Hertford, in which the parish of Great Amwell is situated, and also on the Commissioners of Land Tax acting for the city of London, to shew cause why a writ of prohibition should not issue to restrain them from assessing or levying any land tax upon that portion of the New River which is situate in the parish of Great Amwell, or the said Governor and Company in respect thereof. On the hearing of this

By charter of King James the First, the Governor and Company of the New River were incorporated, and the New River, cut and stream granted to them in fee. The shares of the proprietors have been held to be real estate. By the 38 Geo. 3, c. 5, the county of Hertford is to contribute

41,508*l.* 10*s.* 9½*d.*, and the city of London 123,399*l.* 6*s.* 7*d.* towards the land tax. By s. 4, all the lands, tenements and hereditaments, &c., whatsoever, lying within the respective districts into which Great Britain was apportioned, and all persons, bodies politic and corporate, having any lands, are to be equally charged with a pound rate towards the sum imposed upon such respective districts. By the 57th section, all and any persons having any shares in the New River are to be assessed by the Commissioners for the city of London, and the tax is to be paid by the governor or the treasurer or receiver, to such person as the said Commissioners should appoint. From time to time various shareholders redeemed the land tax on their shares. The New River commences in Hertfordshire, and runs for three miles through the parish of A. in that county. The river, as it existed in 1798, has never been redeemed from land tax except as aforesaid. The Company have since that time purchased land in Hertfordshire, the land tax on the whole of which, with the exception of two roods and ten perches, has been redeemed. On part of the land so purchased, the land tax of which had been redeemed, there are two wells, from the sale of the water of which the Company derive a profit.

Held: First, that no other land tax is payable upon the property of the New River Company as it existed in 1798, than that imposed by the 57th section, and consequently that the river is not taxable in Hertfordshire.

Secondly.—That as to the property since purchased, the land tax of which had not been redeemed, that such property continues to be taxable in Hertfordshire.

Thirdly.—That the Company are not liable to be assessed to the land tax in respect of the springs inasmuch as the redemption of the land tax on the land on which the wells stand relieved the land and all its natural productions from any further tax, though possibly at the time of such redemption it might not have been known that such springs existed.

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rule the Court considered that the facts should be brought before it in the shape of a special case; and accordingly, after writ issued and without pleadings, the following case was stated for the opinion of the Court.—

By charter of his Majesty King James the First, dated June 21, 1619: After reciting that by certain acts of parliament, the mayor, commonalty and citizens of the city of London, had liberty and were enabled to bring a fresh stream of water or New River to London from the springs of Chadwell and Amwell and other springs in the county of Hertford, and that the whole, entire and sole profit, commodity and advantage of the said New River had been assigned to and vested in Sir Hugh Myddelton and others, who had covenanted with his Majesty that he and his successors should have one moiety of such benefit, profit and commodity; the said Governor and Company were incorporated for the purpose of maintaining the said New River, and were empowered to hold lands, tenements, rents and hereditaments, &c. And by the said charter, his said Majesty did give and grant unto the said Governor and Company and their successors the said New River cut and stream with the appurtenances, and all manner of profits, advantages and commodities thereof, or by reason thereof in any sort to be made, raised or gotten: to have, hold and enjoy the said New River cut or stream, and premises, with the appurtenances, to the said Governor and Company and their successors for ever; and to be holden of the said King, his heirs, &c., as of his manor of East Greenwich in the county of Kent, in free and common socage, by fealty and not in chief, nor by knight service: and did, by the said charter, ordain that the said Governor and Company, and their successors, should well and sufficiently maintain, repair, preserve and scour the said New

River and stream, and all the banks and bridges of and belonging to the same as then it was; and that the said Governor and Company and their successors might lawfully alter and change the said New River or cut, in, by and through any of the grounds or soil of the King, his heirs and successors, without any impeachment or impediment whatever.

The moiety belonging to the parties interested was divided into 36 shares, and the moiety belonging to his Majesty was afterwards conveyed by his Majesty to Sir Hugh Myddleton and divided into 36 shares, which were distributed amongst various proprietors. Such shares have been decided to be and have been treated in fact as real estate.—(The case then set out parts of the 1st, 2nd and 3rd sections, and the 4th and 57th sections of the 38 Geo. 3, c. 5 (a)).

(a) Sect. 4. "And to the end the full and entire sum by this Act charged upon the several counties, cities, boroughs, towns and places respectively of England, Wales, and Berwick, as aforesaid may be fully and completely raised and paid to his Majesty's use: Be it enacted, &c., That all and every manors, messuages, lands, and tenements, and also all quarries, mines of coal, tin, and lead, copper, mundic, iron and other mines; iron mills, furnaces and other iron works; salt springs and salt works; all alum mines and works; all parks, chaces, warren, woods, underwoods, coppices; and all fishings, tithes, tolls, annuities, and all hereditaments, of what nature or kind soever they be, situate, lying and being, happening or arising within the several and respective counties,

cities, boroughs, towns or places aforesaid respectively, or within any parts of the same as well within ancient demesne and other liberties and privileged places as without, within that part of Great Britain, called England, Wales or Berwick as aforesaid; and all and every person and persons, bodies politic and corporate, guilds, mysteries, fraternities, and brotherhoods, whether corporate or not corporate, having or holding any such manors, messuages, lands, tenements or hereditaments, or other the premises, in respect thereof; shall be charged with as much equality and indifference as is possible, by a pound rate, for or towards the said several and respective sums by this Act set or imposed, or intended to be set and imposed, for and upon all, and every such counties, cities,

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After the coming into operation of the 38 Geo. 3, on the 5th of February, 1799, the Commissioners of Land Tax for the city of London made the assessment for land tax to the amount of 3,600*l.* in manner following (that is to say): "*Upon all and every person and persons having any share or shares or interest in the New River.*"

From time to time, since the year 1799, divers proprietors of shares in the Company have redeemed the land tax upon their shares, and the land tax has been from time to time thenceforth assessed by the Commissioners of Land

boroughs, towns or other places hereby charged therewith as aforesaid," &c.

Sect. 57. "And be it enacted, by the authority aforesaid, That all and every person and persons having any share or shares or interest in any fresh stream or running water brought to the north parts of London, commonly called the New River, or in the Thames Waterworks, on in Marybone or Hampstead Waterworks; or in any office or stock for insuring of houses in case of fire, or in any lights; or in the stock or stocks for printing of books in or belonging to the house, commonly called the King's printing house, shall pay for the same the sum of four shillings for every twenty shillings of the full yearly value thereof towards the said sum hereby charged upon England, Wales and Berwick-upon-Tweed; and they, and all companies of merchants in London, and the Bank of England, and all salaries and pensions (taxable in London), arising and payable at the general post office, and excise

office, charged by this Act, shall be assessed by the Commissioners nominated and appointed for the said city, or any two or more of them, for their respective shares and interests aforesaid, and the aforesaid joint stock or stocks, and for such salaries and pensions; and the same shall be paid by the governors or the respective treasurers or receivers of the said river-waters and waterworks, and of the offices and stocks respectively, to such person or persons as the said commissioners, or any two or more of them, shall appoint to collect the same, and be deducted at and out of their next dividend; and every person having any salary in respect of any office or employment exercised in the ward of London, where the said post office is situated, shall be assessed and pay for the same, in the same ward, the said rate of four shillings in the pound towards the said sum by this Act charged upon England, Wales and Berwick-upon-Tweed."

Tax for the city of London, in respect of the residue of the shares whereof the land tax has not been redeemed, and the assessment for the year 1853 and for the year 1854, were made in the words following:—

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LAND TAX ASSESSMENT, 1853.

Waters, &c. The City of London Rental.	Names of Proprietors.	Names of Occupiers.	Names or Descriptions of Estates or Property.	Sums Assessed and Exonerated.	Sums Assessed and not Exonerated.
£18,833 : 13 : 9 exonerated.	Upon all and every person and persons having any Share or Shares or Interest not exonerated in the New River.			£2,166 : 14 : 9	£460 : 5 : 8
£2,301 : 6 : 3 not exonerated.	Redeemed from 29th Sept. 1853, By Richard Marshall, Owner of One Share, say				£53 : 15 : 7 £26 : 7 : 9½

LAND TAX ASSESSMENT, 1854.

Water, &c. The City of London Rental.	Names of Proprietors.	Names of Occupiers.	Names or Descriptions of Estates or Property.	Sums Assessed and Exonerated.	Sums Assessed and not Exonerated.
	Upon all and every person and persons having any Share or Shares or Interest in the New River.			£2,219 : 10 : 4	£407 : 9 : 8

The sums from time to time assessed have always formed part of the sum of 123,399*l.* 6*s.* 7*d.*, directed to be levied in the city of London.

Part of the undertaking and works has always consisted of a reservoir occupying a space of about 5½ acres of land, situate in Clerkenwell in the county of Middlesex, but such reservoir and land have never been assessed to the land tax in the county of Middlesex or otherwise, unless it was included in the foregoing assessments.

The New River passes through the parish of Great Amwell, in the county of Hertford, to the extent of three miles in length, and the Company have never, until the

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making of the rate hereinafter mentioned, been assessed to the land tax in respect of the New River in the parish of Great Amwell, or in any other parish or place through which the New River passes, or elsewhere, unless by the assessments hereinbefore set out they have been so assessed in London; but the Commissioners of Land Tax acting for the division in which the said parish of Great Amwell is situate, have by the assessment made by them on the 19th of August, 1854, for the parish of Great Amwell, charged the Company to the land tax for that parish in respect of so much of the New River as is situate in that parish, in manner following:

Rental.	Proprietors.	Occupiers.	Description of Property.	Sums Assessed and not Exonerated.
£100	New River.	New River Company.	River.	£31 : 17 : 6

The land tax assessment for 1854 in the parish of Great Amwell was a new and revised assessment, made in consequence of the defects of the previous assessment, which omitted not only the New River but other properties, as, for instance, the vicar of the parish for his tithes and the owners of all the houses but one at Hertford Heath.

The original bed of the New River in the parish of Great Amwell, with the addition thereto gained by accretion previous to 1799, has not been redeemed from land tax any further or otherwise than herein appears, but the width has been further increased since the year 1799 by the purchase of adjoining lands which now form part of the bed of the river and the banks thereof, and the said river, including the banks, now occupies about 15 acres of land in the parish, the full annual value whereof, for ordinary purposes, does not exceed 60*l.*, but the whole of the land purchased, except

two roods and ten perches, was redeemed from land tax before the 19th of August, 1854.

In part of the land purchased by the Company in the parish of Great Amwell are two powerful wells, the water of which they raise and pour into the New River (a). The Company supply seventeen of the inhabitants of the parish with water, which water was supplied from the New River previous to the acquisition of the said wells, but has since been supplied from the said wells. The water rents received by the Company from the inhabitants of the parish of Great Amwell, amount to 12*l.* 15*s.* per annum.

The amount of 500*l.* at which the said Governor and Company have been assessed was at the rate of 200*l.* a mile, which would make the amount of the assessment 600*l.* Deduction has been made in respect of such land purchased as has been redeemed from land tax.

The Company have for several years been assessed to the poor rate of the parish of Great Amwell in 600*l.*, which amount was confirmed by the Court of Quarter Sessions on an appeal by the Company, and has ever since been acquiesced in by them.

The whole length of the New River, from its spring in the country to its terminus in Clerkenwell, is 37 miles.

The net profits of the Company, with rents of real estates and other sources of income for the year 1854, divided amongst the shareowners, amounted to the sum of 60,912*l.*, of which sum about 45,000*l.* was exclusively for profits from the said river.

The Court is to be at liberty to draw any inference of fact which a jury might have done.

The questions for the opinion of the Court are :—

First.—Whether that part of the New River passing

(a) It was admitted that these purchased property, the land tax wells stood upon that part of the upon which had been redeemed.

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through and situate within the said parish of Great Amwell, or any portion thereof, is rateable to the land tax in the county of Hertford?

Secondly.—If so rateable, to what extent and upon what principle is the same rateable?

Byles, Serjt., (with whom was *Field*), argued for the plaintiffs (*a*).—The questions in this case arise under the 4th and the 57th sections of the 38 Geo. 3, c. 5. By the scheme of taxation contained in that Act, (sect. 2), a gross sum is to be raised from the several counties, &c., in England, Wales and Berwick-upon-Tweed, in certain proportions. A certain fixed sum is assessed upon the city of London, and another such sum on the county of Hertford. By the 57th section “all and every person and persons having any share or shares or interest in any fresh stream or running water, brought to the north parts of London, commonly called “The New River,” or in the Thames Waterworks, or in Marylebone, or in Hampstead Waterworks, or in any office or stock for insuring of houses in case of fire, or in any lights, or in the stock or stocks for printing of books, in or belonging to the house called the King’s Printing House, shall pay for the same the sum of four shillings for every twenty shillings of the full yearly value thereof, towards the said sum hereby charged upon England, Wales and Berwick-upon-Tweed; and they and all companies of merchants in London * * shall be assessed by the Commissioners nominated and appointed for the said city, &c., for their respective shares and interests as aforesaid, &c.; and the same shall be paid by the governors or the respective treasurers or receivers of the said river, waters and waterworks, and of the said offices and stocks respectively * * and be deducted at and out of their next

(a) April 29. Before *Pollock*, C. B., *Martin*, B., and *Channell*, B.

dividend." This section takes the New River out of the operation of the 53rd section, which provides that tenements shall be rated and assessed in the places where they lie, and not elsewhere. But for this, the New River proprietors would have been rateable in Hertfordshire. The New River was made under the powers given by 3 Jac. 1, c. 18, by which the lord mayor, commonalty and citizens of London are to have and take the "use and liberty of such and so much ground as shall contain ten foot in breadth and not above, during and by all the length as the said new channel, cut or river, shall pass for the conveying of the said water from the said springs to the city of London, leaving the inheritance of the new cut in the owners thereof." [*Pollock*, C. B.—They are occupiers of the bed of the cut by their water.] In *Drybutter v. Bartholomew* (a), a husband was seised in right of his wife of a share of the New River water, and it was held that the wife could not be barred without fine. It appears from *Lord Townsend v. Ash* (b), and the note to *Lord Stafford v. Buckley* (c), that fines have ordinarily been levied of New River shares. The individual corporators have the property, the corporation having only the management of it, as was pointed out by *Alderson*, B., in delivering the judgment of the Court in *Bligh v. Brent* (d). The shares being taxed at 4s. in the pound, the property is taxed at the outside value at which realty can be assessed under these Acts: 42 Geo. 3, c. 116, s. 181. No injustice is done to the people of Hertfordshire by holding that the Governor and Company of the New River are not taxable in Hertfordshire, because at the time of the adjustment of the sums to be paid by each county, a less sum must have been assessed upon the counties of Hertford and Middlesex and a greater sum on the city of

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(a) 2 P. Wms. 127.

(c) 2 Ves. Sen. 182.

(b) 3 Atk. 336.

(d) 2 Y. & C. 268, 295.

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London: the value of the New River being taken into account in fixing the proportions of the tax to be paid by the city of London and the counties of Middlesex and Hertford respectively. As to the occupation of the bed of the river, there is no assessable value except that in respect of which the shareholders are assessed in London. If, therefore, the assessment in Hertfordshire is to stand, the property will pay a double tax.—Then, as to the two roods and ten perches purchased by the Company, the land tax of which has not been redeemed. It is clear, as to such accidental accretions as might be caused by the falling in of the banks, and the gradual enlargement of the water-course by that means, the principle “*de minimis non curat lex*” would apply. [*Pollock*, C. B.—That would apply only with respect to gradual accretions not appreciable except after the lapse of time.] If the land is laid into the New River so that it has become part of the New River, it must be assessed in London.—Then, as to the wells, the assessment here is on the New River, but these wells are no part of the New River.

Hugh Hill (with whom was *Lush*), for the defendants.—By the 3rd section of 38 Geo. 3, c. 5, there is an assessment of 4s. in the pound on personal property. The 57th section makes each *person having any share or shares* in the New River Company taxable in respect of the profits. The section says nothing about any tax on the New River itself. Different language is used in the 70th section, by which *the waterworks* in the borough of Southwark are to be rated in Southwark. By the 12th section of the 42 Geo. 3, c. 116, proprietors of canals or other navigations, or other works of public utility, &c., may contract for the redemption of the land tax charged as well on tolls and other profits arising from such canals, &c., or other such works of

public utility, as on any messuages, lands, tenements or hereditaments belonging thereto. The 13th section provides, that persons having any share in the New River or in the Thames Waterworks, &c., may contract for the redemption of the tax charged by way of land tax upon such their respective shares, interests, joint stock and stocks, and profits aforesaid. In these sections a distinction is made between the tax on the joint stock and that on the land itself. [*Martin*, B.—The intention of the 57th section seems to be that there should be but one assessment on the gross proceeds of the property.] The real object was that the tax should be collected without the necessity of following each individual proprietor. The nature of the assessment is not altered by the mode of collection. [*Pollock*, C. B.—If the defendants' construction is correct, the case shews that it has taken a century and a half to find it out. It is sometimes said that a blunder consecrated by length of time must be amended by the legislature. If, however, the language of the Act was plain, we might adhere to it in spite of usage and even decisions: *O'Connell v. The Queen* (a).] It may be suggested that the right of the Company is a mere easement; and, therefore, that the tax is chargeable on the persons to whom such easement is granted. But the charter grants the right to be held in free and common socage. [*Martin*, B.—If the defendants' argument is well founded, the land tax must still be paid upon the whole before any proprietor can get his share of the profits, notwithstanding the redemption by individual proprietors of the land tax on their shares.] It is not contended that the land should be rated at more than the rental at which it might be let to a tenant, or at such a rent as might be obtained for it if it were not in the occupation of the New River Company. [*Pollock*, C. B.—If it is to be rated at all in

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(a) 11 Cl. & F. 155.

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Hertfordshire, the value at which it must be rated must be the share of profits realized in respect of the property there. The land is worth nothing except as a waterway, and as a waterway it is assessed in London.] The 12th and the 49th sections of the 42 Geo. 3, c. 116, make provision for the redemption of the land tax on the messuages, &c., of companies such as the New River Company, apart from the tax on the shares in the joint stock. [*Martin, B.*—The case of the New River Company is quite peculiar: it is a chartered Company, the members of which are held to be seised of the property: I believe that there is no other corporation in the Kingdom similarly circumstanced.]—Then, as to the wells, the Company are liable to be charged with land tax on account of the profits made by the sale of the water. In *The Charing Cross Bridge Company v. Mitchell* (a), it was held that the Company were chargeable to the land tax in respect of the tolls taken from persons passing over the bridge in the parish where the land was situate, notwithstanding the owners of the soil, before the erection of the bridge, had redeemed the land tax. [*Martin, B.*—In that case an entirely new property was created. The case was decided in the Court of Queen's Bench upon the authority of *The Vauxhall Bridge Company v. Sawyer* (b). Here the profits on the sale of the water are merely part of the profits of the land.]—As to the small portion of land purchased, the land tax upon which has not been redeemed; the Company by purchasing this land made themselves liable to be taxed in the county where the land is situated.

Byles, Serjt., in reply.—There are many instances in the 38 Geo. 3, c. 5, besides the 57th section, in which land in one place is to be taxed in another. As to the after

(a) 4 E. & B. 549.

(b) 6 Exch. 504.

purchased land there may be some injustice : but it would be quite as great an injustice to make the Company pay twice in respect of such land. If half a county were bought by the New River Company there might be ground for applying to the legislature to correct any injustice. This small purchase of two roods is nearer to the case of accretion.

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Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This is a special case for the opinion of the Court and the question for our judgment is, whether a part of the New River which passes through and is situate within the parish of Great Amwell in Hertfordshire, or any part thereof, is rateable to the land tax in Hertfordshire. By a charter of King James the 1st, made in 1619, which recited that the mayor, commonalty and citizens of London had the liberty to bring the New River to London from the springs of Chadwell and of Amwell in the county of Herts, and that the said liberty and the profits thereof had been assigned by them to Sir Hugh Middleton and others, and that the latter had by deed covenanted that his Majesty the King should have one moiety of the profits of the undertaking: the Governor and Company were incorporated and the New River granted to them in fee. The moiety of the profits reserved to the Governor and Company was divided into 36 shares. The Crown afterwards granted the other moiety to the New River Company, which was also divided into 36 shares. The 72 shares so created have ever since been held by various proprietors, and have been decided by the Courts of law and equity to be real estate.

In the year 1798 the land tax, which before that time

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had been annual, was made perpetual. This was done by the statute 38 Geo. 3, c. 60, which at the same time made the tax subject to redemption. The statute which imposed the tax so made perpetual was the 38 Geo. 3, c. 5, and the present question depends upon its provisions. That Act enacted that a sum of 2,037,627*l.* 9*s.* 0½*d.* should be levied in Great Britain; and apportioned aliquot portions of this sum upon the various counties, and also upon various cities and towns and districts in England and Wales and Scotland. The county of Hertford (the borough of St. Albans being excepted, which was separately rated) was to contribute 41,508*l.* 10*s.* 9½*d.* The city of London 123,399*l.* 6*s.* 7*d.*, and the county of Middlesex (certain places being excepted and separately charged) 107,602*l.* 11*s.* 7*d.* By the 4th section, it was provided that all the lands, tenements and hereditaments, &c., whatsoever, lying within the respective districts into which Great Britain was apportioned, and all persons, bodies politic and corporate, having any lands, &c., should be equally charged with a 1*l.* rate towards the sum imposed upon such respective districts.

By the 57th section it was enacted, that all and every person having any shares in the New River should be assessed by the Commissioners for the city of London, and the tax should be paid by the governors, or the treasurer or receiver, to such person as the said Commissioners should appoint, and be deducted out of the next dividends. By the 58th section a power is given in case of non-payment to distrain upon the governor or treasurer.

Upon the act of parliament coming into operation the Commissioners for the city of London made an assessment of 3,600*l.*, "Upon all and every person or persons having any share or shares or interest in the New River." From time to time various of the shareholders redeemed their land tax, and the assessment for 1856 was upon all and every

person &c., as before, but stating that 3,219*l.* 10*s.* 4*d.*, part of the sum assessed, was exonerated, and 407*l.* 9*s.* 8*d.* not exonerated. The sum paid by the New River shareholders has always formed part of the sum imposed upon the city of London. The New River, as it existed in 1798, commenced in Hertfordshire and ran for three miles through the parish of Great Amwell, and was never assessed towards the contribution of the county of Hertford until 1854, when an assessment was made of 21*l.* 17*s.* 6*d.* upon the Governor and Company to the land tax for the parish of Great Amwell, in respect of so much of the New River as was situate in that parish. The river as it existed in 1798, has never been redeemed from land tax, except by the shareholders as before mentioned. Since that time the Governor and Company have purchased about 15 acres of land in the parish of Great Amwell which they have added to the river. The land tax in respect of the newly purchased property, with the exception of two roods and ten perches, has been redeemed. In part of the land so purchased there are two wells, and the Governor and Company supply some of the inhabitants of Amwell with the water from these wells, and receive a water rent of 12*l.* 15*s.* per annum.

Three questions were argued before us.—First: Was the New River as it existed in 1798, when the Land Tax Act passed, liable to contribute to the land tax in the parish of Amwell? Secondly: Was the land since purchased by them liable? and Thirdly: Were the springs in the newly purchased land liable?

As to the last question, it was stated by my Brother *Byles* that these springs were in the land of which the land tax had been redeemed, and it was agreed by Mr. *Hugh Hill* that this was to be taken to be so, except we were informed to the contrary. We have not been so informed; and assuming, therefore, that the land tax has

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been redeemed, we think the Governor and Company are not liable in respect of the springs, as we consider the redemption relieves the land and all its natural production and profits from further tax, although it may be that it was not known at the time of the redemption that they existed. The case of *The Charing Cross Bridge Company v. Mitchell* (a) is clearly distinguishable. The hereditament there was an entirely new one, created by an act of parliament, and not any part of the natural production and profit of the soil.

As to the first question it was contended, that upon the true construction of the Act, the land tax should, in the first instance, be imposed upon the land covered with water belonging to the Corporation of the Governor and Company, and that the counties of Hertford and Middlesex, through which the New River runs, were entitled to have the tax paid, in respect of the lands therein respectively, towards the contribution imposed upon them, and that the 57th section was applicable only to the net profits of the undertaking which were ultimately to be divided amongst the shareholders.

To this it was answered, that no instance could be shewn of two assessments to the land tax in respect of the same property, and that the meaning and intention of the legislature was, that the entire land tax payable in respect of the New River property should be paid under the provisions of the 57th section; that in all probability these provisions were inserted by agreement between the Treasury and Chancellor of the Exchequer and the New River Company and the various other public bodies mentioned in it, and that the contemporaneous usage, continued without interruption for nearly sixty years, was very strong evidence that this was so. That no

(a) 4 E. & B. 549.

injustice whatever was done to Hertfordshire or Middlesex, as the sums imposed upon them were no doubt proportionably reduced, and that upon London increased, by reason of the New River land tax being payable exclusively there.

We think the latter argument by much the more cogent, and that it ought to prevail; and that, according to the true construction of the Act, no other land tax is payable upon the property of the New River Company, as it existed in 1798, than that imposed by the 57th section. We think the most express and clear words would be necessary to justify us in disturbing a system of taxation which has existed for so long a period, unquestioned and acquiesced in by all parties interested; and it is certain that no words of this character are to be found in the Act.

As to the second question, we think that the land tax is payable in respect of land subsequently purchased by the New River Company. It could not have been the intention of the legislature that the New River Company, by purchasing land in Hertfordshire, could withdraw it from its liability to contribute to the land tax imposed upon that county; it would be most unjust that such should be the consequence, and we think it was not so intended, and that land purchased by the New River Company, subsequently to the passing of the Act in 1798, remains in their hands subject to contribution to the Hertfordshire land tax, in like manner as when it was in the possession of the vendors.

Our answer to the questions proposed to us therefore is, that the taxation of the property of the New River Company, as it existed in 1798, is to be made exclusively under the 57th section. That as to newly purchased property it remains taxable as before; and that, as to the wells, the land tax is redeemed by the redemption of the land out of which they issue.

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NEW RIVER
COMPANY
v.
LAND
TAX COMMISSIONERS
FOR
HERTFORD.

1857.

April 20.

GREEN v. STEVENS.

In an interpleader issue to try whether certain goods were the property of the plaintiff as against the defendant, the execution creditor; it was proved that the goods were, at the time of the seizure, in the possession of the execution debtor to whom they had been let by the plaintiff. The goods were in fact the property of W., who had lent them to the plaintiff, who was his agent, allowing her to let them as owner to whom she would. Held, that the plaintiff had sustained her claim.

THIS was an interpleader issue, in which the question was whether certain goods which had been seized in execution by the sheriff upon a judgment in a case of *Stevens v. Seaton* were "the property of the plaintiff Mary Green, as against the defendant," the execution creditor.

At the trial before the learned Assessor, at the Court of Passage for the borough of Liverpool, it appeared that the goods in question consisted of the furniture of a house in which they were seized. The goods and house were in the possession of Jane Seaton, the defendant in the former suit, who was a prostitute. In the year 1856, these goods had been let with the house, by the claimant Mary Green, to Jane Seaton; Green receiving the rent. But it appeared that the real owner of the house and goods was a man named Williams, and that Green was merely his agent, and dealt with the property for him, he not wishing his name to appear. The learned Assessor told the jury that the question really was, whether the furniture was the property of the judgment debtor, Jane Seaton, and that if not, the sheriff had no right to seize it; and if they thought that the furniture was the property of Williams, but that he had lent it to Green, and allowed her to let it as owner to whom she would, they ought to find for the plaintiff.

Brett moved for a new trial.—The goods were in the actual possession of Jane Seaton, the execution debtor. The claimant, Mary Green, not being in actual possession, was bound to shew a title to the property in herself. [*Pollock*, C. B.—The issue in the present case is,

not whether the goods were the property of Mary Green absolutely, but whether they were hers as against the defendant. My impression is, that this form of issue has been adopted for the express purpose of enabling any person lawfully entitled to possession to sustain his claim.] In *Gadsden v. Barrow* (a) it was held that it was competent to the execution creditor to defeat the title of the claimant, who alleged that he was entitled under a bill of sale, by proving a prior bill of sale to a third party. It was said that the plaintiff had no right to set up a claim unless the goods were his property. [*Bramwell*, B.—Is not the question whether the claimant has such a title as would enable her to maintain an action against the sheriff?] In *Green v. Rogers* (b) *Cresswell*, J., said, that no one had any right to interfere with the seizure except a person who had the property in the goods, and that the sole question therefore was, whether the goods were the property of the claimant. *Chase v. Goble* (c) confirms this doctrine. Here Williams, the party really interested, should have been the claimant. [*Martin*, B.—Green being lawfully entitled to the possession of these goods, by the permission of Williams, it matters not, for the purpose of this issue, that Williams might have taken the goods from her.]

POLLOCK, C. B.—I am of opinion that the Judge was right, and there will therefore be no rule.

MARTIN, B., concurred.

BRAMWELL, B.—In an interpleader issue the plaintiff must make out his title, but he may do so by shewing that

(a) 9 Exch. 514. In that case plaintiff.
the form of the issue was whether (b) 2 C. & K. 149.
the goods "were the goods of the (c) 2 Man. & G. 930.

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he has such a right to the goods that they cannot be taken from him by the execution creditor. In the present case the Judge appears to have said that it was not necessary to shew that the goods were absolutely the property of the claimant if they were hers in any sense. I think that this was a just remark, and that if a claimant has any sort of title it must be taken that he has a right to defend it until the contrary is shewn. If it is shewn that he has a lawful title to the possession, that is enough. Thus, if a person lends a horse to a friend, who leaves it at a livery stable, and the horse is seized under an execution, the bailee may establish his claim to the possession in an interpleader issue. But if a butler were to lend his master's plate he could not sustain a claim to it in an interpleader, though the execution debtor had not any right to take it. I think that the decision in the case of *Gadsden v. Barrow* (a) was correct.

CHANNELL, B.—I agree that there ought to be no rule in this case. The evidence shewed that the judgment debtor, who was in possession of the goods, had no title as against Mary Green. It is said that Mary Green had no title under the loan by Williams to her. But she obtained possession, and gave it over to the judgment debtor, and the question is, not whether Williams had a right to the goods, but whether the property was in Mary Green, as against the judgment debtor, to whom she had delivered them.

Rule refused.

(a) 9 Exch. 514.

1857.

IN RE WILLIAM DAVIS.

April 24.

THIS was an application for a writ of habeas corpus, to bring up the body of William Davis, who was committed to the House of Correction at Swaffham, in the county of Norfolk, under the following warrant of commitment.—

“Whereas William Davis was this day duly convicted before me J. R. T., one of the justices for the county of Norfolk, as a rogue and vagabond: For that he, the said William Davis, being a suspected person, on the 3rd day of March, A. D., 1857, at the railway station in the parish of Downham Market, in the said county, the same being, at the time, a place of public resort, did frequent the platform of the said station with intent to commit felony, contrary to the form of the statute, &c.; and was by me adjudged to be committed for his said offence to the House of Correction, to be kept to hard labour for the space of three calendar months. These are therefore to command you,” &c.

A commitment under the 4th section of the Vagrant Act, 5 Geo. 4, c. 83, stated that the prisoner being a suspected person, on &c., at the railway station in the parish of &c., the same being at the time a place of public resort, did frequent the platform of the said station with intent to commit felony. — *Held sufficient.*

Langford now moved accordingly.—The commitment is bad. It purports to be made under the 4th section of the Vagrant Act, 5 Geo. 4, c. 83, which enacts, “that every suspected person or reputed thief, frequenting any river, canal or navigable stream, dock or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any *place of public resort*, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony,” &c., “shall be deemed a rogue and vagabond.” Therefore it ought to appear, on the face of the commitment, that the place

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IN RE
DAVIS.

frequented was one of those specified. This commitment however, merely states that the prisoner frequented the platform of the railway station. The Court will not take judicial notice of a platform of a railway station, and the commitment should have averred that it was a place of public resort. Where a commitment stated that the prisoner, being a suspected person, did unlawfully frequent a certain street, to wit Regent Street, with intent to commit felony, that was held bad, for not shewing that Regent Street was a place of public resort, or adjacent to one: *In re Jones (a)*. [Pollock, C. B.—Here it is stated, that at a railway station, being a public place, the prisoner frequented a particular part of it.] It is not every part of a railway station which is public, and this might have been a private part of the platform. In Webster's Dictionary nine definitions are given of the word "platform," and the Court cannot tell in which sense it is here used. [Bramwell B.—If the commitment had merely stated that the prisoner frequented a "platform," that would have been bad, but it states that he frequented the "platform of the said station," and that is stated to be a place of public resort. Pollock, C. B.—If a commitment stated that Regent Street was a place of public resort, and that a reputed thief frequented the pavement of it, we should know that he frequented a place of public resort.]

Per CURIAM (b).—There will be no rule.

Rule refused.

(a) 7 Exch. 586.

(b) Pollock, C. B., Martin, B., and Bramwell, B.

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CHRISTOPHER CHARLES FOSTER v. PRITCHARD and
WHITROE.

May 7.

THIS was an action of trespass against the high bailiff of the Southwark County Court and his assistant, for entering the plaintiff's house, and taking his goods under colour of a warrant of execution on a judgment in that Court against one Charles Joshua Foster. The cause was tried before *Martin, B.*, at the Middlesex sittings after last Hilary Term, when a verdict was found for the plaintiff with 10*l.* damages, and the learned Judge refused to certify for costs.

Upon an interpleader summons under 9 & 10 Vict. c. 95, s. 118, the Judge of the County Court had decided that the goods seized were the goods of the claimant, but no complaint had been made before him as to the breaking and entering the house of the claimant. The claimant afterwards brought an action against the bailiff of the County Court for breaking and entering his house and taking his goods, under colour of a warrant of execution, and recovered damages; whereupon the bailiff applied for a

Hannen now moved for a rule to shew cause why the judgment should not be set aside, and all the proceedings thereon stayed, upon the ground that the action was brought for a trespass by a seizure in execution, in respect of which a claim had already been made and adjudicated upon under the 9 & 10 Vict. c. 95; and why the plaintiff should not bring the *postea* into Court and file the plea roll, and why the defendant should not be at liberty to enter a suggestion to deprive the plaintiff of costs pursuant to the 9 & 10 Vict. c. 95, s. 139.

The application was founded upon an affidavit which

rule to stay the proceedings, upon the ground that a claim had already been made and adjudicated upon in respect of the same cause of action: the Court refused to interfere.

Scamle: Per *Bramwell, B.*, that under the section in question the County Court Judge has no power to adjudicate as to the trespass.

The plaintiff having recovered only 10*l.* damages the Judge refused to certify for costs. After the action had been commenced and before trial, the 139th section of the 9 & 10 Vict. c. 95, which deprived a plaintiff of costs, in an action in a superior Court against an officer of a County Court in respect of any grievance committed under colour of the process of that Court, where the jury should not find more than 20*l.* damages, unless the Judge should certify, was with other clauses of the same statute repealed, "except as to acts done under them," by 19 & 20 Vict. c. 108, s. 2.—*Held*, that the latter Act did not alter the rights of the parties as to costs.

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stated, that the defendants, as the high bailiff of the Southwark County Court and his assistant, carried on business within the jurisdiction of the County Court of Surrey, within which the cause of action arose, and that the plaintiff dwells, and always, since the committing of the grievances, dwelt within the jurisdiction of the County Court of Southwark, and within twenty miles from the place where the defendants dwell and carry on their business. On the 24th of January, 1856, one John Sharp entered a plaint in the County Court of Surrey to recover a debt of 17*s.* from Charles Joshua Foster, and obtained an order for payment of the same, and 2*s.* 11*d.* costs, by instalments. The plaintiff not having paid the instalments, John Sharp caused a warrant to be issued out of the said County Court to levy the sum of 19*s.* 11*d.*, and the costs of that execution. Under this warrant the defendants took a music stool and two chairs as the goods of Charles Joshua Foster. The defendant Whitroe did not know that the house in which the goods were was the house, or that the goods were the goods, of the plaintiff, and believed himself to be acting in obedience to the warrant. The defendant Pritchard was not present, and did not interfere. Christopher Charles Foster, the now plaintiff, made a claim to the chairs and stools, whereupon the clerk of the County Court issued a summons calling upon Christopher Charles Foster and John Sharp to appear before the Court, whereupon it was adjudged, by the said Court, that the goods so seized were the property of the now plaintiff, C. C. Foster. He stated to the Judge of the County Court, at the hearing of the summons, that the house in which the goods were taken was his home and residence, but did not make any claim or complaint against the defendants in respect of the seizing of the goods, or entering his house for the purpose of seizing

the same. The action was commenced on the 23rd of June, 1856, to recover damages solely in respect of such entry under colour of the said warrant, and for no other grievance. Issue was joined on the 13th of July. On the 1st of October the 19 & 20 Vict. c. 108 came into operation, the 2nd section of which repealed the 139th section of the 9 & 10 Vict. c. 95 (a).

Hannen.—In the case of *Tinkler v. Hilder* (b), where the County Court Judge had adjudicated upon an interpleader summons, under 9 & 10 Vict. c. 95, s. 118, under circumstances similar to those in the present case, *Parke*, B., made an order staying the proceedings upon terms; and on an application to set it aside, the Court, with the exception of *Platt*, B., were all agreed that the learned Judge's decision was correct, and that the whole matter was disposed of by the interpleader summons. That case was confirmed by *Winter v. Bartholomew* (c). [*Bramwell*, B.—In *Mercer v. Stanbury* (d) we held that, assuming the Judge of the County Court to have jurisdiction, yet if he had not in fact adjudicated upon the matter when the parties were before him upon the interpleader summons, there was no ground for our interference. I had a strong opinion that the Judge of the County Court had no jurisdiction.]—As to the second point, the question is whether the 2nd section of the 19 & 20 Vict. c. 108, which repeals the 9 & 10 Vict. c. 95,

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(a) Enacts—"That if any person shall bring any suit in any of her Majesty's superior Courts of record in respect of any grievance committed by any clerk, bailiff, or officer of any Court holden under this Act, under colour or pretence of the process of the said Court, and the jury upon the trial of the action shall not find greater damages for the plaintiff than the sum

of twenty pounds, no costs shall be awarded to the plaintiff in such action, unless the Judge shall certify in Court upon the back of the record that the action was fit to be brought in such superior Court."

(b) 4 Exch. 187.

(c) 11 Exch. 704.

(d) *Post*, p. 155, note (a).

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s. 139, except as to acts done under it, affects the liability to costs of a defendant in an action commenced before the 29th of July, 1856.

Per CURIAM.—On that point we think there ought to be a rule, but not as to the first point.

Francis now shewed cause.—After this action was commenced, the 139th section of the 9 & 10 Vict. c. 95, was (with other provisions of that Act) repealed by the 19 & 20 Vict. c. 108, s. 2, “except as to acts done under them.” The trespass for which this action is brought does not come within that exemption. An act done under a statute means an act done in pursuance or by virtue of it. The wrongful seizure of the plaintiff’s goods is not in any sense an act done under the statute. [*Martin*, B.—Is not the true meaning this—“except as to acts within the protection of the repealed clause?”] The exemption has reference to such cases, as where the Judge has ordered a debt to be paid by instalments: sect. 92. It is true that when the action was commenced the 139th section was in force, but at the time the verdict was pronounced there was nothing on which it could operate. In order to give it effect, two things must concur,—the action must be brought in one of the superior Courts, and the jury must find damages not greater than 20*l*.—He referred to *Regina v. Inhabitants of Denton* (a).

Hannen appeared in support of the rule, but was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the exemption extends to this case: the rule will therefore be absolute.

(a) 18 Q. B. 761.

MARTIN, B.—I am of the same opinion. There is no doubt about the intention of the legislature, and we ought to give effect to it, instead of putting a narrow construction on the Act.

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BRAMWELL, B.—If the words of the statute had been “acts done under and subject to,” there would have been no difficulty.

Rule absolute (a).

(a) The case of *Mercer v. Stanbury* was not reported because the Court gave no decision on the principal point. It was as follows:—

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The defendant had recovered a judgment for 8*l.* 2*s.* 3*d.* in the Barnet County Court of Hertfordshire, against one Willmore, and issued execution against his goods. The bailiff went to the house of the plaintiff (where it was alleged that Willmore resided), accompanied by one Filby, a collector of the defendant, and there at Filby's request took in execution a horse and cart. The plaintiff, who carried on the business of a laundress, claimed the horse and cart as her property, whereupon the bailiff caused an interpleader summons to issue, and upon the hearing the County Court Judge decided that the horse and cart were the plaintiff's property and gave the plaintiff the costs of the interpleader proceedings. The plaintiff then brought the present action. The first count of the declaration stated that the defendant broke and entered a close of the plaintiff, and seized and took a horse, cart and harness of the plaintiff, &c.: by means whereof for four weeks the plaintiff was deprived of the use of the horse, cart and harness, and was obliged to hire another horse, cart and harness, for the purpose of carrying on her business of a laundress and was also by means of the premises prevented from delivering clothes to her customers in her business of a laundress, and two of her customers in consequence left her.—The second count stated that the defendant broke and entered a stable of the plaintiff and seized and took a horse, cart, and harness of the plaintiff then being in the stable.—The third count stated that the defendant broke and entered a yard of the plaintiff and seized and took a cart of the plaintiff then being in the yard. The second and third counts contained the same allegation of special damage.

F. Russell, in Easter Term, 1856, obtained a rule to shew cause

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why two of the three counts of the declaration as relate to the same cause of action, and also so much of the declaration as relates to the taking the goods and the damages arising therefrom, should not be struck out, against which

Montagu Chambers and Codd shewed cause, in the same Term (May 6).—The material part of the rule involves two questions, first, whether the County Court Judge had jurisdiction to adjudicate in respect of the damage consequent on the seizure of the goods; secondly, whether the Court will strike out of the declaration so much as relates to the seizure of the goods and the damages arising therefrom, seeing that a real damage has been sustained, upon which the County Court judge has not in fact adjudicated. First, the County Court judge had no power to adjudicate upon the claims to consequential damage. By the 9 & 10 Vict. c. 95, s. 118, "if any claim shall be made *to or in respect of any goods or chattels* taken in execution," &c., it shall be lawful for the clerk of the Court, upon application of the officer charged with the execution of such process, &c., "to issue a summons calling before the said Court as well the party issuing such process as the party making such claim," &c., "and the judge of the County Court shall *adjudicate upon such claim*, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit," &c. That enactment only empowers the County Court judge to determine whose property the goods are. In *Tinkler v. Hilder* (a), where the Court stayed proceedings, the application was by the bailiff of the County Court, who is in the same position as a sheriff of the superior Courts; and under the Interpleader Act, 1 Wm. 4, c. 58, s. 6, Courts of law are invested with powers similar to those exercised by Courts of equity: *Winter v. Bartholomew* (b). *Cater v. Chignell* (c) is no authority on the point, as the decision was founded on an offer made by the plaintiff's counsel, and acquiesced in by the defendant's. The form of the interpleader order is, that the said goods and chattels are the property of the claimant: *Pollock's County Court Practice*, Appx., p. 123, 3rd ed. In *Berwick v. Boffey* (d), *Alderson, B.*, said, that in an interpleader suit there is no amount of debt or damage for which judgment is given. In *Hollier v. Laurie* (e), which was an action against a sheriff for breaking and entering the plaintiff's house, the Court refused to stay the proceedings, holding the relief and protection

(a) 4 Exch. 187.

(b) 11 Exch. 704.

(c) 15 Q. B. 217.

(d) 9 Exch. 315.

(e) 3 C. B. 334.

afforded to the sheriff by the 1 & 2 Wm. 4, c. 58, s. 6, to be confined to disputed claims to the goods seized.—Secondly, the Court will not stay the proceedings, since the County Court judge has not adjudicated on the damage. In *Abbott v. Richards* (a), where the Court ordered that so much of the declaration as charged the sheriff with converting the goods should be struck out, *Alderson, B.*, observed, in the course of the argument, that possibly the judge might have power to direct two issues, the one to determine the right to the goods, the other to determine the damages sustained by the seizure." Here, the County Court judge has merely adjudicated as to the right to the goods, and not as to the damage consequent on their seizure.

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F. Russell, in support of the rule.—No answer has been given to the first part of the rule, which seeks to strike out the two counts, &c. [*Alderson, B.*—It is better to include the whole claim in one count.] The second is the material part of the rule, and unless it be made absolute, the effect will be to repeal the 118th section of the 9 & 10 Vict. c. 95. A person whose goods are wrongfully taken in execution must necessarily sustain some damage, and therefore it may reasonably be presumed that the legislature had that in view at the time they passed the enactment. [*Bramwell, B.*—Where a person's goods are wrongfully taken in execution and detained for two weeks, it could never have been the intention of the legislature that he should not be compensated in damages. The 118th section seems to provide only for actions against the "officer charged with the execution of the process."] The section says, "and thereupon any action which shall have been brought," &c., "in respect of such claim, shall be stayed;" that is, any action arising out of the assertion of the claim. The legislature intended to give the entire jurisdiction to the County Court. Here there is no special misconduct on the part of the officer of the Court, but only special damage. In *Tinkler v. Hilder* (b) special damage was alleged, and yet the Court stayed the proceedings. That decision was approved of and acted on in *Jessop v. Crawley* (c).

Cur. adv. vult.

Pollock, C. B. (June 10), said.—In this case we think that the rule ought to be discharged. It was an application to strike out of the declaration so much as related to the taking the plaintiff's goods and the damages arising therefrom, on the ground that the

(a) 3 D. & L. 487; 15 M. & W. 194. (b) 4 Exch. 187.
 (c) 15 Q. B. 212.

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claim had been adjudicated upon by the County Court Judge on an interpleader summons, and the question was as to the jurisdiction of the judge of that Court, as to which there may be some doubt. It appears to us, that whether or not he had the jurisdiction in question he has not exercised it, and therefore the rule must be discharged.

The question as to striking out the counts was referred to *Bramwell, B.*, at chambers, who ordered the declaration to be amended by putting the whole complaint in one count, and on reading his order a rule was drawn up accordingly.

April 27.

SMALLEY v. THE BLACKBURN RAILWAY COMPANY.

TRESPASS for mesne profits.

Pleas.—First: Not guilty.

Second.—That the land was not the land of the plaintiff.

Lands were taken by the defendants, a railway Company, for the purposes of their railway. On the 27th of June, 1854, the owner of the lands brought ejectment to recover possession. On the 3rd of August the defendants executed a deed poll, under the 77th section of the Lands Clauses Consolidation Act, for the purpose of vesting the

lands in themselves. At the trial, on the 8th of August, a verdict was taken for the plaintiff, subject to a reference of the action and all matters in difference between the parties to an arbitrator, who was to ascertain what sum should be paid by the defendants to the plaintiff as the price of, or compensation for the land of the plaintiff, the plaintiff thereby consenting to make and execute a conveyance, &c. The arbitrator made his award and directed that a verdict for the plaintiff should stand, and that a sum of money should be paid by the defendants to the plaintiff as the price of and compensation for the land of the plaintiff, which the Company, at the time of the making of the order of reference, had taken for the purposes of the railway. The plaintiff having signed judgment, sued out a writ of possession, under which he took possession of the land, and afterwards brought an action for mesne profits.—*Held*, that the question of mesne profits was a matter in difference between the parties which appeared by the award to have been disposed of by the arbitrator.

Third.—That before the commencement of this action the defendants had taken possession of the land in the declaration mentioned for the purposes of their railway; that thereupon an action of ejectment was brought by the plaintiff against the defendants: that the action came on for trial, when it was agreed that the jury should find a verdict for the plaintiff, subject to be vacated, and a verdict for the defendant or a nonsuit entered, and that the cause and all matters in difference should be referred to the award of J. P.; and that it was agreed that the arbitrator should, by his award, ascertain and decide what sum should be paid

by the defendants to the plaintiff as the price of or compensation for the land of the plaintiff, which the defendants had taken for the purposes of their railway; the plaintiff thereby consenting and agreeing to make and execute or procure such a conveyance to the defendants, and by such parties as the arbitrator should direct; the plaintiff also agreeing that certain sums paid into the Bank of England by the defendants in respect of the said land should be disposed of as the arbitrator should direct: that the arbitrator made his award and directed that the verdict which had been entered for the plaintiff should stand, and that the sum of 719*l.* 4*s.* should be paid by the defendants to the plaintiff as the price of and compensation for the land of the plaintiff which the Company had, at the time of the making the said order of reference, taken for the purposes of their railway: that out of the sums of money formerly paid into the Bank of England the said sum of 719*l.* 4*s.* should be paid to the plaintiff, &c.: that, excepting the costs, there were no other matters in difference between the parties other than those so decided, &c. The defendants further averred that they had at all times been ready and willing, and had in fact performed all things therein contained on their parts to be performed, and that the subject matter of this action was a matter in difference at the time of the making the order of reference and award.

The plaintiff took issue upon the first and second pleas, and replied, to the third plea, that the subject matter of this action was not a matter in difference at the time of the making of the order of reference. At the trial before *Willes, J.*, a verdict was taken for the plaintiff, subject to the following case:—

Robert Smalley the elder, being seized in fee of certain land, devised the same to Nancy Smalley, Henry Ellison and the plaintiff, upon certain trusts; and, amongst other things, in trust for Nancy Smalley for her life, or so long

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as she should continue his widow; and subject thereto to such of his sons as should be living at the time of his decease. Robert Smalley the elder died in 1820, and thereupon Nancy Smalley entered into possession, and so continued till her death in February, 1852. H. Ellison died in March, 1831. On the 12th of August, 1845, the defendants entered upon and took possession, for the purposes of their railway, of 2 roods and 10 perches of the said land. On the 24th of October in the same year, the defendants served Nancy Smalley with a notice to purchase and take the 2 r. 10 p. under the 18th section of the Lands Clauses Consolidation Act, 1845, and afterwards made application to two justices in pursuance of the 59th and 85th sections of the same act, and obtained the nomination and appointment of a surveyor.

The surveyor having been appointed, made a valuation of 2 a. 2 r. 17 p., comprising the 2 r. 10 p. taken possession of on the 12th of August, 1845, amounting to 411*l.* 10*s.* On the 7th of January, 1846, the defendants entered into possession of 2 a. 0 r. 7 p. in addition to the 2 r. 10 p. already taken, making together the 2 a. 2 r. 17 p. valued by the surveyor, and on the 23d of February, the defendants, in pursuance of the 85th section of the Act, paid into the Bank of England "to the credit of the defendants, the account of Nancy Smalley," the sum of 411*l.* 10*s.* On the 4th of March the defendants executed a bond conditioned for the payment of the purchase money of the 2 r. 10 p.

On the 8th of May, 1848, the defendants served Nancy Smalley with notice, under the 18th section of the Lands Clauses Consolidation Act, that they required to purchase and take the 2 a. 2 r. 17 p. for the purposes of their railway. No communication having been received by the defendants in answer to this notice, they caused Nancy Smalley to be served with a notice of their intention to summon a jury under the 23rd section of the said Act, stating in such

notice that they were willing to give 525*l.* for the said land. The sheriff summoned a jury accordingly, but Nancy Smalley not having appeared, the sheriff did not proceed with the inquiry. On the 24th of June, 1848, the defendants gave notice of their intention to apply to two justices to appoint a surveyor; and such two justices having afterwards appointed John Ashworth as surveyor to value the 2 a. 2 r. 17 p., he valued the same at 411*l.* 10*s.* On the 30th of June, 1848, the defendants executed a deed in pursuance of the 77th section of the Lands Clauses Consolidation Act, 1845, for the purpose of vesting the possession of the 2 a. 2 r. 17 p. in them.

On the 26th of July, 1854, the defendants tendered to the plaintiff the sum of 411*l.* 10*s.*, and 50*l.* 8*s.* for interest thereon at 5*l.* per cent. from the time of the death of Nancy Smalley. On the 1st of August the defendant deposited the sum of 411*l.* 10*s.* in the Bank of England "to the account of the Accountant General in Chancery to the credit of the defendants, the account of Robert Smalley, Thomas Smalley, and other parties interested." On the 3rd of August, 1854, the defendants executed another deed for the purpose of vesting in themselves the 2 a. 2 r. 17 p., in pursuance of the 77th section of the Lands Clauses Consolidation Act, 1845.

On the 27th of June, 1854, the plaintiff brought an action of ejectment to recover the 2 a. 0 r. 7 p. of the land of which the defendants had taken possession on the 7th of May, 1846. At the trial on the 8th of August, it was agreed that a verdict should be taken for the plaintiff, subject to be vacated, and instead thereof a verdict for the defendants, or a nonsuit entered, and that the cause and all matters in difference between the parties should be referred to the award of J. P., who was by his award to ascertain and decide what sum should be

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paid by the defendants to the plaintiff, as the price or compensation for the land of the plaintiff which the defendants had taken for the purposes of their railway, the plaintiff thereby consenting and agreeing to make and execute or procure such a conveyance to the defendants by such parties as the arbitrator might direct; that both the sums paid into the Bank of England should be disposed of as the arbitrator should direct, &c.

On the 5th of March, 1855, the arbitrator made his award, that the verdict which had been entered for the plaintiff should stand, and that the sum of 719*l.* 4*s.* should be paid by the defendants to the plaintiff as the price of and compensation for the land of the plaintiff, which the said Company had, at the time of the making the said order of reference, taken for the purposes of their railway; and that the sums of money formerly paid into the Bank of England in respect of the land should be disposed of as follows: that is to say, 719*l.* 4*s.* should be paid to the plaintiff, and the residue to the defendants. On the 24th of July, 1855, the plaintiff signed judgment in the ejectment, and on the 12th of September in the same year, the sheriff delivered to the plaintiff possession of the 2 a. 0 r. 7 p. under a writ of habere facias possessionem.

The questions for the opinion of the Court are, whether the plaintiff is entitled to recover anything from the defendants in the said action. If the Court shall be of opinion that the plaintiff is not entitled to recover anything from the defendants in the said action, then the verdict now entered for the plaintiff is to be set aside, and a verdict to be entered for the defendants.

Joseph Kay (with whom was *Hugh Hill*) argued for the plaintiff.—All the proceedings of the defendants under the Lands Clauses Consolidation Act were irregular. The award of the arbitrator shews that the plaintiff is entitled to the

land; he is therefore entitled to the mesne profits for the whole time during which the defendants occupied it. The case does not shew that anything was in fact said about mesne profits when the parties were before the arbitrator; and the award does not purport to dispose of them. The order of reference and award may be read and compared with the 124th section of the Lands Clauses Consolidation Act, 1845, which distinguishes between *compensation for the estate, right, or interest of any party in lands* which the promoters may have taken, and *compensation for the mesne profits*. A reference of "all matters in difference" does not include a future or contingent claim. Only such differences as have actually arisen at the time of the reference are referred: *In re Brown and The Croydon Canal Company (a)*, *Cockburn v. Newton (b)*, *Harding v. Forshaw (c)*. Till after the recovery in the ejectment no action for mesne profits could have been maintained. Future differences can only be referred by express words, such as are not found in the order of reference now in question. [*Martin, B.*—I have always understood that the object of referring an action of ejectment and all matters in difference was to get rid of all further litigation and dispose of the question of mesne profits.]

Edward James (with whom was *Boden*), for the defendants, was not called upon.

POLLOCK, C. B.—I am of opinion that there must be judgment for the defendants. *Mr. Kay* has argued that the claim for mesne profits was at the time of the reference, a future and contingent claim, which the arbitrator had no power to dispose of. The answer to that is, that after the

(a) 9 A. & E. 522. See per
Littledale, J., p. 529.

(b) 2 Man. & G. 899.

(c) 1 M. & W. 415.

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Company had taken possession of the land, it was supposed that they were not entitled to it, and an action of ejectment was brought, which, with all matters in difference, was referred. The reference was not merely as to the title, but was intended to put an end to all further litigation, and to give the plaintiff full compensation for every claim he could have. The arbitrator has in terms disposed of every matter in dispute. The parties expressly contemplated the settlement of the question of mesne profits; and the arbitrator having awarded in respect of them, the plaintiff must pursue his remedy under the award.

MARTIN, B.—I am of the same opinion. The third plea, which sets out the order of reference and the award, states that the mesne profits were a matter in difference. The replication takes issue on that. According to the evidence, I think that the plea was proved. The defendants, a railway Company, having taken possession of certain land of the plaintiff, he brought an action of ejectment, which, together with all matters in difference, was referred to an arbitrator, who was to “decide what sum should be paid by the defendants to the plaintiff, as the price of or compensation for the land of the plaintiff, which the defendants had taken for the purposes of their railway, the plaintiff consenting to make and execute or procure a conveyance to the defendants.” The arbitrator awarded that the verdict for the plaintiff should stand, that is, that the plaintiff had a legal right to the property at the time of the commencement of the suit: then that 719*l.* 4*s.* should be paid to the plaintiff as the price of and compensation for the land, and that there was no other matter in dispute except the costs. It was contended that the plaintiff had a right to sue out a writ of possession and bring an action for the mesne profits. At first I thought the award bad, but the legal title had probably become vested in the defendants subsequently to

the commencement of the action. My impression is, that wherever an action of ejectment and all matters in difference are referred, the question of mesne profits is referred. However that may be in ordinary cases, it is clearly referred in the present instance.

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BRAMWELL, B.—I am of the same opinion. No objection has been made that the award is bad, but the question is whether it has disposed of the mesne profits. The plaintiff claimed the land; and if he was entitled to it, he was also entitled to compensation for its occupation by the defendants. Every matter in difference was referred to the arbitrator; and, therefore, the question as to the mesne profits was referred. The intention of the parties is expressed in plain terms. As to the period subsequent to the making of the award, the third plea seems to me in effect a plea of leave and licence: it sets out what amounts to an agreement that the defendants should thenceforth keep possession of the lands, and though the licence might have been revocable if the defendants did not perform the award, yet the plea avers that they were always ready and willing to perform it. Therefore, after the order of reference, the defendants were lawfully in possession by the leave and licence of the plaintiff.

CHANNELL, B.—The plaintiff claims damages for the wrongful possession of the land by the defendants, both before and after the date of the order of reference. He contends that the subject-matter of the present action was not a matter in difference at the time of the reference. I do not say whether, in ordinary cases, the reference of an action of ejectment "and all matters in difference" includes such a future claim as that for mesne profits. But, in the present case, looking at the whole matter, it is clear that the amount of damages and the sum to be paid for the land

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were embraced by the submission ; and whatever was involved in that inquiry was referred. The defendants had taken possession of the land and paid money into the Bank of England. The arbitrator directed the verdict for the plaintiff to stand ; he therefore decided that, at the time of the commencement of this suit, the legal estate was in the plaintiff. The arbitrator appropriated the money paid into the Bank, and directed that the sum of 719*l*. 4*s*. should be paid as the price of and compensation for the land of the plaintiff, which the defendants had taken. No doubt, the meaning of the arbitrator was that the sum so awarded should be taken in full satisfaction of all claims by the plaintiff. The arbitrator did not direct a conveyance to be executed, but he may have considered that the legal estate became vested in the defendants subsequently to the commencement of the suit. Whatever may be the effect in ordinary cases, of a reference of an action of ejectment and all matters in difference, here the parties have, in plain terms, consented to refer the damages, and upon that ground I am of opinion that there must be judgment for the defendants.

Judgment for the defendants.

REGULÆ GENERALES.

EASTER TERM, 1857.

It is ordered that plaintiffs suing in contract for 20*l*. or less, may, if they claim costs, indorse on the writ of summons the following notice:—

“Take notice, that if judgment be signed for default of appearance, the plaintiff will without summons apply to a Judge for his costs of suit, unless before such judgment

you shall give notice to him, or his attorney, that you intend to oppose such application."

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And it is further ordered, that if the defendant give such notice, the plaintiff shall proceed by summons and order.

But if the defendant give no such notice, the plaintiff may produce such indorsement to a Judge at Chambers for an order for costs, *ex parte*, and if the Judge shall sign his name to the indorsement, such signature shall be an order for costs, and the Master may tax them thereon accordingly. In case of any application for costs without such indorsement, the plaintiff shall not be entitled to more costs than if he had made such indorsement, unless a Judge shall otherwise order.

Entry of Satisfaction on Judgments.

Upon a satisfaction piece, duly signed and attested, in accordance with the 80th Rule of Hilary Term, 1853, being presented to the clerk of the judgments of the Masters of the Court in which the judgment has been signed, he shall file the same and enter satisfaction in the judgment book against the entry of the said judgment, and no roll shall be required to be carried in for the purpose of entering satisfaction on a judgment.

April 23, 1857.

CAMPBELL.
A. E. COCKBURN.
W. ERLE.
E. V. WILLIAMS.
CHARLES CROMPTON.
J. WILLES.
FRED. POLLOCK.
SAMUEL MARTIN.
G. BRAMWELL.
W. F. CHANNELL.

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EASTER VACATION, 20 VICT.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

CHASEMORE v. RICHARDS, Clerk to the CROYDON LOCAL
BOARD OF HEALTH.

May 12.

The owner of a mill on the banks of a river cannot maintain an action against a land-owner, who sinks a deep well on his own land and by pumps and steam-engine diverts the under-ground water which would otherwise have percolated the soil and flowed into the river by which, for more than sixty years, the mill was worked.

ERROR on the judgment of the Court of Exchequer for the defendant on the following special case, stated for the opinion of this Court by an arbitrator to whom the cause had been referred by order of Nisi Prius.—

The first count of the declaration charged, that before and at the time of the committing of the grievances herein-after respectively mentioned, the plaintiff was possessed of a certain mill, messuage and dwelling-house, and certain closes and premises, with the appurtenances, and was entitled to the flow of a stream called the River Wandle, passing near to, along, by and through the said closes and mill, for the purpose of working and using the said mill, and for the more convenient enjoyment of the said mill, messuage and dwelling-house, and closes, with the appurtenances: Yet the said Local Board of Health on, &c., and on divers other days, wrongfully abstracted and prevented the flow of, and diverted the water of the said stream away from the said mill; and also wrongfully abstracted and prevented, and intercepted the flow of, and diverted water which ought to have flowed, and ought still to flow, into the said stream and to the said mill, and do so continue to abstract, prevent, divert and intercept the same respectively, to wit, by there digging and sinking a well near to the said stream, and taking the water of such well.

To this the defendant pleaded, that the said Local Board of Health are not guilty as alleged: and the defendant stated in the margin of the said plea, "By statute 11 & 12 Vict. c. 63, s. 139, being a Public Act."—On this issue was joined.

The plaintiff is, and at the time of the acts complained of was, possessed of and was the occupier of an ancient mill, on the River Wandle, in the county of Surrey, called Waddon Mill, situate about one mile from the town of Croydon in the said county.

The plaintiff and the preceding possessors and occupiers of the said mill had, for upwards of sixty years next before the acts of the Local Board hereinafter mentioned, and for upwards of sixty years next before the bringing of the action, used and enjoyed as of right, and been entitled to use and enjoy, the flow of the said river for the purpose of working and using the said mill.

The River Wandle commences, and always has commenced, its course near the part of the town of Croydon which is nearest to the said mill, and the said river flows, and always has flowed, thence to and by the plaintiff's mill.

The River Wandle is, and always has been, fed and supplied above the plaintiff's mill by (among other sources of supply), the water produced by the rain fall on a district of many thousand acres in extent, comprising the town of Croydon and its vicinity. Large quantities of this water sink into the upper ground to various depths, and then flow and percolate through the strata towards and to the River Wandle, (if not interfered with); in some instances rising to the surface as springs, and then flowing as little surface streams into the river; in other instances finding their whole way under ground into the river. The precise lines and courses in which the underground runlets and particles of water so find their way under ground towards

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and to the river vary continually and infinitely with the shiftings and variations in the soil, which occur from natural causes; but the general flow of large quantities of water to the River Wandle is as above described, and if they are not interfered with or intercepted, they form considerable sources of supply to the river as well above as below the plaintiff's mill.

It is impossible to know beforehand the precise or complete effect which the sinking a new well, and pumping from it in any part of the district above described may have upon springs or streams in the vicinity: the effect may be instantly sensible and considerable, or for a long time no sensible effect may appear; but the natural effect of abstracting a large quantity of water at any spot of the district above described is to diminish the quantity at every other spot throughout the district, though the amount of diminution at particular spots may be infinitesimally small; and the natural effect to be reasonably expected from sinking a new well in such a district, and from continually, or almost continually, pumping thence large quantities of water for a long time must be the sensible diminution of the water supply of springs and streams in the vicinity.

The above description is to be taken to apply to the district in question, not merely at the present time, but for sixty years and upwards next before the works and acts of the Local Board of Health hereinafter mentioned, and for sixty years and upwards next before the bringing of the action.

The Local Board of Health for the town of Croydon was duly constituted under the Public Health Act, and under the Public Health Supplemental Act, 1849.

In the year 1851, the said Local Board, for the purpose of supplying the town of Croydon with water and for other sanitary purposes, under the said statutes made and sunk a

large well, to the depth of seventy-four feet, in their own ground, in a piece of land of and belonging to them in the town of Croydon, and within the district which has been above described. The distance of the said well from the commencement of the River Wandle is about a quarter of a mile. They also erected pumps and steam engines on their own ground, and commenced to pump water from the well into a reservoir and pipes for the supply of the town, at the end of the said year, and with slight periods of intermission have continued to do so to the present time.

The amount of water so pumped and taken by them through and from the said well, during the period of six calendar months from the 16th August, 1853, to the 16th February 1854, was between five hundred thousand and six hundred thousand gallons daily. Part of the said quantity of water so then pumped and taken by them through and from the said well, was water then flowing and finding its way underground through the strata, in the manner above described, and towards the River Wandle; and if not intercepted by the operation of the said well and pumping, would have flowed and found its way into the River Wandle above the plaintiff's mill, but which, by the operation of the said well and pumping, was drawn away into the said well, and thence pumped up and taken by the said Local Board. And I find, as a fact, that the said Local Board did, during the six months aforesaid, by means of the said well and pumping, abstract, divert, and intercept underground water, but underground water only, that otherwise would have flowed and found its way into the River Wandle, and would then and there, as part of the water and stream of the said river, have flowed and found its way to the said mill of the plaintiff, and have been applicable and serviceable to and for the working thereof; and that the same was

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sufficiently in quantity to have been of sensible value in and towards the working of the said mill.

And I find that the said Local Board did not during any part of the time in question intercept, divert, or abstract, or draw into their well any water which had already joined the said River Wandle and become integral part of the same, or which had already joined and become integral part of any surface stream running into the said river.

I further find that the said Local Board, throughout all their acts and works hereinbefore described, were actuated by no malice against the plaintiff or any one else, and that they did not intend in any way to diminish the quantity of water in the River Wandle, or to injure any person interested in the use of the said river; but the said board at the time of their said acts and works, throughout the period of six months particularly in question in this cause, had reasonable means of knowing the probable and natural effects of their said acts and works.

In considering this case the Court are to have power to draw all inferences of fact which a jury might draw.

The question for the opinion and judgment of the Court is, whether, under these circumstances, the said Local Board are legally liable in this action to the plaintiff for the abstraction of water as above described

Bovill (with whom was the *Attorney General* and *Raymond*) argued for the plaintiff in Trinity Vacation, 1856 (June 16) (a).—There is a material distinction between the withdrawing water from land saturated with it, and diverting a spring for the purpose of draining the land. If the former can be lawfully done, the owner of a few rods

(a) Before *Coleridge, J., Wight- liams, J., Crompton, J., and Crow-*
man J., Cresswell, J., Erle, J., Wil- *der, J.*

of land might sink on it a deep well, and so destroy all the neighbouring mill-owners' property. On the other hand it will be said, that to deny this, is to take from the landowner his right to use the water on his land. The right to water is a natural right, and depends on the same principle as the enjoyment of light and air. They are all the gift of Providence for the common benefit of mankind. Every person has a right to the enjoyment of the water flowing through or being on his land, just as he has to the enjoyment of light and air. It makes no difference whether the water flows on the surface or saturates the land beneath it. If the water is confined to a particular stream or current, its enjoyment is limited to the riparian proprietors; but if instead of flowing in a channel it is diffused throughout the land, the right to its enjoyment more nearly resembles the corresponding right to light and air. The Local Board of Health has no other right in this respect than a private individual. The Health of Towns Act, 11 & 12 Vict. c. 63, s. 145, provides "that nothing in that Act shall be construed to authorize the Local Board of Health to use, injure, or interfere with any water-course, stream, river, &c., in which the owner or occupier of any lands, mills, &c. shall or may be interested without consent in writing," &c. Therefore the defendant who represents the Local Board, is in the same position as an ordinary landowner claiming to exercise certain rights in respect of his land. Although it was formerly considered that the right to water depended on a presumed grant, from long acquiescence and enjoyment, it is now settled that the right is a natural right—the gift of Providence; that all may reasonably use the water who have a right of access to it, subject however to the similar rights of the owners of adjacent land: *Embrey v. Owen* (a). The enjoyment,

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(a) 6 Exch. 353, 369.

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whether it be of water, light, or air, must be reasonable. All being entitled to the use, the maxim applies "sic utere tuo ut alienum non lædas." No proprietor of land has any right to water, light, or air, except as incident to the enjoyment of his property; and he is only entitled to a reasonable appropriation of them as incident to such enjoyment. For instance, he may either by himself, his family, or servants, drink the water, or use it for domestic purposes. Again, he may use it for the cultivation of his land, and for that purpose he may drain his land even to the injury of his neighbour. So if he built on his land, he might acquire a right to more water for the inhabitants of the houses. All these are reasonable uses of the water. But it would not be reasonable or incident to the enjoyment of the land, for the owner to sink a deep well, and by a steam-engine pump up the water so as to divert the entire stream. It makes no difference whether the water is altogether taken away, or is put into reservoirs for sanitary uses. If it may be abstracted for a purpose not incident to the enjoyment of the land, no stream is safe. There are two authorities expressly in the plaintiff's favour. In *Balston v. Bensted* (a) the plaintiff and defendant were respectively owners of adjoining closes on the banks of the River Medway. As far back as could be recollected there had been a spring of water on the plaintiff's close, which ran from thence to the river. For more than twenty years this water had been appropriated by the occupiers of the plaintiff's close; when the defendant became owner of the adjoining close, and opened a stone quarry in it, whereby the water coming to the spring on the plaintiff's land was diverted: Lord *Ellenborough* ruled that twenty years exclusive enjoyment of water, in any particular manner, afforded conclusive presumption of right

(a) 1 Camp. 468.

in the party so enjoying it. In *Dickinson v. The Grand Junction Canal Company* (a) the defendants sank a well on their own land, and erected over it a pump and steam-engine, by which they pumped into their summit level a quantity of underground water, which would otherwise have flowed underground into a river, and also a quantity of underground water, which would otherwise have percolated the intervening chalk and earth underground into that river, both of which quantities of water would, in the natural and accustomed course of the river, have flowed to the plaintiff's mills; and it was held that, at common law, an action would lie against them for the abstraction of the water, whether it was part of the underground water-course, or percolated through the strata. That decision was approved of by the Master of the Rolls (b). *Acton v. Blundell* (c) is supposed to be an authority the other way. There it was held that the owner of land through which water flows in a subterraneous course, has no right or interest in it which will enable him to maintain an action against a landowner, who in carrying on mining operations on his own land drains away the water from the land of the first mentioned owner. That decision, however, is not consistent with the doctrine on which later cases depend, viz., that the right to water is a natural right: it proceeded on the ground of enjoyment on the one side, and acquiescence on the other; but there could be no acquiescence, because the neighbouring owner could not know of this underground water, or if he did, he could not tell how much, if any, when the ground was in its natural state, belonged to him, and how much to the owner

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(a) 7 Exch. 282.

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(b) See *Dickinson v. The Grand Junction Canal Company*, 15 Beav.

(c) 12 M. & W. 324.

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of the well. In one report of *Broadbent v. Ramsbotham* (a) *Parke, B.*, is stated to have said, that all the courts disapproved of that part of the judgment in *Acton v. Blundell*, which denied the natural right to water. In that case, however, the plaintiff did not complain of an interference with his natural right to the water, but of an injury to his artificial supply by means of the well which he sunk; he was therefore bound to shew a twenty years user. Here, as in *Dickinson v. The Grand Junction Canal Company* (b), the plaintiff complains of an injury to his natural right. That decision was approved and confirmed in *Rawstron v. Taylor* (c) and *Broadbent v. Ramsbotham* (d). The former case decided that the owner of land has an unqualified right to drain it for agricultural purposes, in order to get rid of mere surface water, the supply of the water being casual, and its flow following no regular or definite course. *Broadbent v. Ramsbotham* is to the same effect. In *Wood v. Waud* (e) the right was treated as ex jure naturæ, and therefore not destroyed by unity of seisin. Then if the enjoyment depends on natural right, what distinction is there in principle between surface and underground water? Here the defendant has abstracted the water, not in the reasonable and ordinary use of it, but to the injury of the right which the plaintiff has enjoyed for sixty years.

Sir *F. Kelly* (with whom was *Lush* and *Miller*) for the defendant.—The claim cannot be supported either on principle or authority. The use of water is necessarily of common right. If the claim could be enforced it would

(a) 25 L. J. Exch. 121.

(b) 7 Exch. 282.

(c) 11 Exch. 369.

(d) 11 Exch. 602.

(e) 3 Exch. 748.

lead to absurd and mischievous consequences. The plaintiff insists, that by the mere possession of a mill he is entitled as of right against all mankind, that the quantity of water which has heretofore existed above the mill shall continue to flow for ever, and that he may sue any one who intercepts it at any part of its natural course before it reaches the stream: therefore he would have a right of action under whatever circumstances it was intercepted, provided the quantity taken interfered with the working of the mill. Suppose the quantity adequate to work the mill amounted to 900,000 gallons a day, the plaintiff claims a right to maintain an action against any one, not who takes water out of the stream, but who intercepts it in any part of its natural course to the stream, whereby that quantity is diminished. Again, suppose that for more than twenty years there were no houses on the banks of the stream above the mill, and then that a town grew up and numerous houses were erected on each side of the river, the proprietors of those first erected might incur no liability; but as soon as so many wells were sunk as to diminish the supply to the mill of 900,000 gallons per day, those parties would be liable to an action. *Dickinson v. The Grand Junction Canal Company* (a) is the only authority on which the plaintiff can rely; but there it was not necessary that the point should be decided, because, under the act of parliament, whenever the company took water from the rivers for the use of their canal, they were bound to supply the mills with an equal quantity from their reservoir. In *Dickinson v. The Grand Junction Canal Company* the Court said that the mill owner was not only entitled to the water in the stream, but to all that was necessary for working his mill, in its way to the stream throughout the whole length

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of its natural course. If that were so, the mill owner would be entitled to the rain which fell from the heavens, and before it reached the earth, for its natural course is from the clouds to the earth, and through the earth to the stream. What ground in law is there for the distinction as to reasonable use or degree? It has been conceded that each proprietor of a house may sink a well and use the water for domestic purposes; therefore the right of the mill-owner must be subject to the right of the individual proprietors; then why may they not unite and sink one large well for their common use? That is all that has been done here: instead of a thousand wells, one artesian well has been sunk. There is nothing unreasonable in that. Here is a district of many thousand acres, and it is impossible to say at what particular spot, or in what quantity, the water is abstracted before it reaches the river. What is a reasonable purpose, and where does the right of action begin? Suppose each inhabitant, in addition to using the water for washing and other domestic purposes, chose to brew his own beer, could it be said that he would be liable to an action, and if not, why may not a brewer sink a well sufficiently large to supply all the inhabitants with beer? If it be lawful for families to take the water for ordinary domestic consumption, is it not equally lawful for a tradesman to take it in order to supply them? In Com. Dig. "Action upon the Case for a Nuisance" (C), it is said, that no action will lie "if a man use water in his own land out of a watercourse running through his land to the pond of B., whereby B.'s pond is not so full, if he does not divert the watercourse: Per *St. John* at Suffolk Ass., 1657, between *Smart* and *Stisted*." The authorities on this subject apply exclusively to water forming part of a stream or watercourse, and visible to the eye. Water is publici

juris, subject to the use of it by each person under or through whose land it flows, so that he uses it in reasonable quantities, and does not divert its course. If this had been the case of water flowing above ground, the mill-owner's right would have been clearly subject to the right of the other proprietors who took it for reasonable purposes, even though the result might be absolutely to stop the mill. Here water is taken which flows under ground; but it is taken by the proprietors of the ground, and it is below the surface of the land which they occupy: moreover they have taken it, not for their own purposes, but for the domestic and sanitary purposes of the inhabitants of the district through which the water flows. In *Acton v. Blundell* (a) *Tindal*, C. J., points out the distinction between the case of surface water and underground water, both as regards the origin of the law as to running streams, and the consequences which would result if the same law was made applicable to springs beneath the surface. It is argued that the true principle is not acquiescence: if not, it follows that there must be some positive and absolute right to the water. If twenty years enjoyment constitutes the right, it must proceed on the ground that those who had the means of preventing its exercise have acquiesced in it. But the owner of the soil cannot tell, without expensive experiments, whether or no the water flows under his ground. The only distinction between this case and *Acton v. Blundell* (a) is, that here the plaintiff is the owner of a mill. How can a user for twenty years establish a prescriptive right against the right of every inhabitant of the district to use the water under his own land for his own reasonable purposes. It is true that in *Wood v. Waud* (b) the water diverted flowed from an artificial watercourse, but it was

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(b) 3 Exch. 748.

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water which, if that artificial channel had not been formed, would have flowed into the natural stream, upon the banks of which the plaintiff's mill was situated. *Smith v. Kenrick* (a) is also an authority in the defendant's favour. There *Maule, J.*, maintained the doctrine laid down in *Acton v. Blundell* (b). The maxim "*sic utere tuo ut alienum non lædas*" does not apply to the defendant, but to the plaintiff, who seeks to use his property in a manner which would deprive the whole district of the supply of water. *Embrey v. Owen* (c) was a case of surface water. There is no authority confirming the doctrine laid down in *Dickenson v. The Grand Junction Canal Company*, but, on the contrary, it has been qualified, if not overruled, by *Rawstron v. Taylor* and *Broadbent v. Ramsbotham*.

Bovill, in reply.—There is no presumption that the persons who are now supplied with the water are the same as those who took it, each for himself, before this well was made; or that it was taken by them in the same quantity as now; indeed the presumption is the other way. The defendant does not deny that the right is *ex jure* and incident to the soil; if so, there must be some limit to the use: there cannot be a right to take the whole by sinking a well to any depth. The right is to the water percolating through the ground, and not to all that is found there. *Rawstron v. Taylor* only decided that the owner may drain his land for agricultural purposes. *Broadbent v. Ramsbotham* was a case of surface water. All the cases limit the right to the reasonable enjoyment of the land as owner, and the reasonable use of the water. There is no practical difficulty in ascertaining what is a reasonable use, and it must always

(a) 7 C. B. 515.

(b) 12 M. & W. 324.

(c) 6 Exch. 353.

vary with reference to the particular circumstances of each case. *Smith v. Kenrick* was the case of an artificial excavation.

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Cur. adv. vult.

The learned Judges having differed in opinion, the judgment of all the members of the Court, except *Coleridge, J.*, was delivered by

CRESSWELL, J.—I am of opinion that our judgment in this case must be in favour of the defendant in error.

In coming to this conclusion, I adopt the statement of the law with regard to the right to flowing water made in *Embrey v. Owen* (6 Exch. 369), and it may be convenient to read the passage as printed in that book.—“The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a “*bonum vacans*,” to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only: see 5 B. & Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.”

The owner of a mill on a flowing stream is in the same position as a riparian proprietor; he can have no larger right than that which he has by nature against those above or below him, unless it has been acquired by adverse user. A party, whether mill-owner or riparian owner, suing for

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abstraction of water, must establish a right either jure naturæ or by user, and in the latter case the user must be such as to establish a servitude affecting the land through which the water flows. Every riparian owner is by nature subject to the natural rights of those lower down, which are in the nature of a servitude imposed on his land,—a servitude “ne facias.”

Let us inquire whether this servitude, imposed by nature or by user, can extend to water oozing through land near a flowing stream, and which, if not intercepted, would find its way into that stream.

None of the text books or decisions, in which an attempt has been made to define the rights of riparian owners to *flowing water*, have extended them beyond some definite ascertained flowing stream, with the exception of *Dickinson v. The Grand Junction Canal Company* (a).

To extend them further would interfere with rights of the landowner which have never yet been disputed. Thus a riparian owner cannot divert a flowing stream for any purpose, whether for irrigating or draining his land, or any other, to the prejudice of other riparian owners. But it has never yet been held, nor was it contended on the argument of this case, that a man might not drain his land and so abstract water oozing through it, although such water would otherwise have found its way to a flowing stream. Nor has it been contended that an owner of land, situate near a flowing stream, may not make a pond for use or ornament, although water would ooze into it which otherwise would have gone into the stream; but he could not for any of these purposes abstract water from a flowing stream. Again, the owner of land near a flowing stream has hitherto been supposed to have the right of preventing

(a) 7 Exch. 282.

water from oozing into his land from higher ground, provided he does not throw it back upon his neighbours; but he can no longer do that if water so percolating is to be put on the same footing as a naturally flowing stream; for that he cannot lawfully divert, even for the purpose of preventing injury to his land. But if he may prevent the water from coming into his land, why should he not allow it to come, and then collect and use it? And to allow this would be in direct conformity with the two recent decisions of the Court of Exchequer: *Rawstron v. Taylor* (a), and *Broadbent v. Ramsbotham* (b).

There are two cases in our books, and I believe two only, which support a claim to water not in a flowing stream, *Balston v. Bensted* (c), and *Dickinson v. The Grand Junction Canal Company* (d). In the former of those cases, Lord *Ellenborough* said "that there could be no doubt but that twenty years exclusive enjoyment of water in any particular manner, affords a conclusive presumption of right in the party so enjoying it." His lordship is not reported to have explained the nature of the presumption to be made, but at that period it seems to have been supposed that the right of a riparian owner arose out of some presumption of a grant by those higher up the stream; it is therefore probable that in the case then before him, which related to the water springing up in the plaintiff's land, he meant that an enjoyment of it for twenty years raised a presumption of a grant—a presumption not generally made against those who had no knowledge of the existence of that which they are to be presumed to have granted, and I do not understand that any one has insisted in this case upon the doctrine of

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(a) 11 Exch. 369.

(c) 1 Camp. 463.

(b) Id. 602.

(d) 7 Exch. 282.

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presumption, which was altogether repudiated in the other case alluded to, *Dickinson v. The Grand Junction Canal Company*, where Lord Chief Baron *Pollock*, in giving the judgment of the Court, says, "We consider it as settled law that the right to have a stream running in its natural course is not by a presumed grant from long acquiescence on the part of the riparian proprietors above and below, but is *ex jure naturæ*, and an incident of property, as much as the right to have the soil itself in its natural state, unaltered by the acts of a neighbouring proprietor, who cannot dig so as to deprive it of the support of his land." It would seem therefore that the Court of Exchequer, as constituted when that judgment was given, would not have rested an opinion in favour of the plaintiff, in *Balston v. Bensted*, on the ground stated by Lord *Ellenborough*.

But in the case of *Dickinson v. The Grand Junction Canal Company*, which was a case stated by order of the Master of the Rolls for the opinion of that Court, questions were put involving the right of a man to sink a well in his own ground, and intercept water which would have percolated and gone through the intervening strata into a flowing stream. Amongst others, these two questions were put, viz., first, whether the Company, by digging the said well at Cow Roast, and pumping the water thereout, and thereby diverting and preventing from flowing into the River Bulbourne, and pumping into the said summit level of the canal a quantity of underground water, which in the natural and accustomed course of such water, anterior to and at and ever since the 11th of September, 1847, would have flowed under ground into the River Bulbourne, and which water would in the natural and accustomed course of the Rivers Bulbourne and Gade,

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have flowed to the mills of the plaintiffs, and been applicable to the working thereof, and have thereby prevented the plaintiffs from working their mills so beneficially as they otherwise might and could and would have done, have violated the 58 Geo. 3, c. xvi., and the articles of agreement of the 11th of September, 1817, or either and which of them, or have rendered themselves liable to an action, irrespective of the said act of parliament and agreement. Secondly, whether the Company by digging the said well at Cow Roast, and pumping the water thereout, and thereby diverting and preventing from flowing into the River Bulbourne, and pumping into the said summit level of the canal a quantity of underground water, which would otherwise have percolated and gone through the intervening chalk and earth under ground, and would in the natural and accustomed course of the Rivers Bulbourne and Gade, have flowed to the mills of the plaintiffs and been applicable to the working thereof, and have thereby prevented the plaintiffs from working their mills so beneficially as they otherwise might and could and would have done, have violated the 58 Geo. 3, c. xvi., or the articles of agreement of the 11th of September, 1817, or either and which of them, or have rendered themselves liable to an action irrespective of the said act of parliament and agreement." The Lord Chief Baron answers them in these terms:—"With respect then to the right of action of the mill-owners, at common law, against the Company, for abstracting water which actually had formed a part of the stream of the rivers Gade and Bulbourne by sinking the well, we think that the Company are liable for sinking the well.—As to the abstraction of the water which never did form part of the rivers, but has been prevented from doing so in its natural course, by the excavation of the well, whether the water was part of an

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under ground water course, or percolated through the strata, we are also of opinion that an action would lie. The mill-owners were entitled to the benefit of the stream in its natural course, and they are deprived of part of that benefit if the natural supply of the stream is taken away." The subject is dismissed with this simple assertion of the right, and we are not in possession of the reasoning by which the Court arrived at that conclusion. Another point decided in that case, viz., that the Company by sinking a well had broken their agreement, rendered the rights of the parties at common law immaterial to the decision of the case, and which may account for the dismissal of this novel point with so little observation; and in *Broadbent v. Ramsbotham*, the case having been cited in argument, *Parke, B.* observed, "That case only decided that if a person has a right to a stream *jure naturæ*, he has a right to its subterranean course." If it went beyond that, it appears to have been repudiated by the same Court in *Rawstron v. Taylor* and *Broadbent v. Ramsbotham*, and I think rightly; and adopting the law as laid down in these two latter cases, I am of opinion that the action cannot be maintained, and that the judgment of the Court below must be affirmed.

COLERIDGE, J.—The parties in this case are a mill-owner on the one hand, the plaintiff, the Local Board of Health for the town of Croydon, represented by the defendant, on the other. The plaintiff, after entitling himself to the flow of a stream called the River Wandle, for the purpose of working and using his mill, and for the more convenient enjoyment of it, complains in his declaration that the defendant has wrongfully abstracted and prevented the flow of, and diverted the water of the said stream away from the mill, and also wrongfully abstracted and prevented

and intercepted the flow of, and diverted water which ought to have flowed into the said stream and to the said mill, by digging and sinking a well near to the said stream and taking the water of the said well.

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The defendant pleads "not guilty," by statute. The case has been referred, and the arbitrator has found the facts specially:—He has found the plaintiff's right and mode of enjoyment for upwards of sixty years before the committing of the acts complained of and before action brought. He has acquitted the defendant from any abstraction of water from the stream itself; but he finds a considerable abstraction from one of the sources of supply to the stream. He finds that large quantities of the rainfall, in a district of many thousand acres, sink into the upper ground, and then flow and percolate through the strata to the River Wandle,—in some instances rising to the surface, as springs, and flowing as surface streams into the river; in other instances finding their whole way under ground into the river by lines and courses which continually vary from natural causes; but that the general flow of large quantities of water to the river thus takes place, and if they are not interfered with, or intercepted, they form considerable sources of supply to the river above the plaintiff's mill.

He further finds that the precise or complete effect of sinking a new well and pumping from it, in any part of the district, cannot be known beforehand, nor when it will appear; but the natural effect of abstracting a large quantity of water at any spot of the district is to diminish the quantity at every other spot in it, and *the natural effect to be reasonably expected* from sinking a new well in the district, and from almost continually pumping thence large quantities of water for a long time, must be the sensible diminution of the water supply of springs and streams in the vicinity.

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He further finds that the defendant has sunk a well seventy-four feet in depth in a piece of land belonging to himself in the district, the well being sunk at about a quarter of a mile from the commencement of the river; that he has also erected pumps and steam engines, and, with slight periods of intermission, has pumped water from the well for the supply of the town at the rate of 500,000 or 600,000 gallons daily. Part of this water was flowing and finding its way underground through the strata in the manner above described towards the river, and but for its having been thus intercepted would have reached the river above the plaintiff's mill, would have found its way to the mill, and have been applicable and serviceable to and for the working of it; and this in sufficient quantities to have been of sensible value in and towards the working of the mill.

Upon this statement the plaintiff's previous enjoyment is clear; his right to it is also clear. It is clear that the defendant by his act has diminished it; and that he has done so by acts of which "the natural effect to be reasonably expected" was to produce the injurious consequences, which have in fact resulted; and although the precise or complete effect of merely sinking the well, or of pumping from it, could not be known beforehand, nor when it would appear, yet he must now be taken to have known before his continual pumping that those consequences would result. The question then is, whether any action is maintainable against him for these acts; and I am of opinion that this question is to be answered in the affirmative.

I suppose that if the same acts, which are now complained of in respect of subterranean water, had been done in respect of water on the surface, the plaintiff's right and the injurious consequences to that right and its enjoyment being supposed to be the same as now found, no question

could have been made as to the right of action. The rights of the owner of land by or through which water flows, merely as such owner, and apart from any prescriptive title, are now well settled; and I do not know where they are more clearly stated than by Chancellor *Kent* in his *Commentaries*, vol. 3, pp. 439, 441. The whole passage is extracted in the judgment of the Court of Exchequer in *Embrey v. Owen* (a), and therefore I need not now repeat it. But this passage is in strict accordance with the law of this country, as propounded in *Mason v. Hill* (b), and adopted in *Acton v. Blundell* (c) by the Court of Exchequer Chamber. But the passage in *Kent* is important, because it states correctly not only the general nature of the right in the absence of all interference with it by prescription or otherwise, but the limitations in the mode and extent of enjoyment, which are involved in the very nature of the right itself. There is no general property in the water any more than in light, or air, but a right to use it as it flows—and this extending equally to all the riparian proprietors, above and below: but this right involves, almost necessarily, that of abstraction and temporary diversion for the purposes which are essential to the enjoyment or profitable use of the property through or by which the water flows,—this right however restrained in the measure of its exercise by a due consideration for the equal rights of riparian proprietors below or above. If even the reasonable necessities of one riparian were the only limit to his right of abstraction, he might, where the supply of water was limited, exhaust the whole. But this he cannot do, for then he would violate the equal rights of all below him. Accordingly we find in a note to the passage in *Kent*, p. 440, two cases from the American Reports referred to,

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(a) 6 Exch. 369.

(b) 5 B. & Ad. 1.

(c) 12 M. & W. 349.

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Arnold v. Foot (a) and *Brown v. Best* (b), deciding this. In the former, where a spring of water rose in the land of A., and runs a stream in the land of B., it was held that A. had no right to divert the stream from its natural channel to irrigate his land, *if he thereby exhausted the running stream*: though there can be no doubt that this would have been a perfectly legitimate mode of exercising his natural rights as a riparian, if he thereby had not abridged the natural or conventional rights of any riparian proprietor lower down the stream. These common and equal rights, I need hardly say, may be varied to almost any extent by usage or prescription from which a grant must be inferred, or by express grant. It follows, of course, that any infringement of what I may call the natural rights of a co-riparian in the first case, or of his conventional rights in the latter, is actionable: and upon this footing, as we know, actions are very commonly maintained, the rights being both extremely valuable and very open to infringement.

But in the case of *Acton v. Blundell* before mentioned, the law in respect to subterranean water came to be considered, and a different principle was laid down. It is necessary therefore now to examine what that case decided, and what principle it laid down: if its decision governs this case, I for one should be of opinion that in a co-ordinate Court we ought to act upon it, whether approving it or not, and leave it to be reviewed, and overruled if thought proper, in the House of Lords. But if it does not by its decision govern the case in hand, we are at liberty to consider its principles before we apply them to materially different facts, especially if we find that those principles have already been thought unsatisfactory, and that decisions have passed inconsistent with them.

Now it is certain that *Acton v. Blundell* does not decide

(a) 12 Wendell, 330.

(b) 1 Wilson, 174.

the point now before us. In that case the plaintiff's right stood on no user for twenty years, and in the judgment the Court expressly states that it intimates no opinion whatever as to what the rule of law might be, if there had been an uninterrupted user of the plaintiff's right for more than the last twenty years. Here the plaintiff relies on an uninterrupted user for more than sixty years, he stands not on what I have called the natural right of a riparian proprietor, but on the conventional rights, which are to be inferred from that user. Whether this claim can be made out or not, is not the question now,—it is at all events a different one, and was not in question in *Acton v. Blundell*.

We are therefore at liberty to examine the general principles laid down in that case; and in the first place, with a view again of distinguishing it from the present, I remark that in establishing the distinction for which it contends, between superficial and subterranean waters, the judgment assumes certain facts; one of the most important, it should seem, is the ignorance which the landowner has of the course of springs below the surface, of the changes they undergo, of the date of their commencement, and so on. I confess I do not see how this ignorance is material in respect of a right which does not grow out of the assent or acquiescence of the land owner, as in the case of a servitude, but out of the nature of the thing itself; whether material however or not, it cannot in any pertinent sense be said to exist here; the course by which the diverted water here percolates, is not indeed seen, nor has it any one channel defined by visible banks, but its direction is as well known as if it ran in such a channel on the surface, and is regulated by as ancient and well known and as unvarying a law as the descent of any superficial stream. Further, the act of diversion cannot be considered an act done in ignorance; the plaintiff's

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ancient right the defendant must be taken to have known, and that the uninterrupted percolation of water to the stream was necessary to the full enjoyment of it; he has diverted that percolation by a combination of continued acts, of which the arbitrator finds "the natural effect to be reasonably expected," was to produce the injurious consequences actually experienced. What more could be said if he had dammed up, and turned into an immense reservoir, all or any material part of a stream flowing superficially to the supply of the river?

But let me now examine the main principle, which the judgment in *Acton v. Blundell* lays down, in the conclusion, as governing the right of subterranean water. It is not stated very confidently, or very precisely,—the words are these: "the case *rather falls within that principle*, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure, and that if in the exercise of such right he intercepts or drains off the water collected from under ground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action" (a).

Why water in a natural course of transit under ground should, as such, be more a subject of individual property than water flowing above ground, is not explained; but passing that by, it seems to have been overlooked, that the water draining from under his neighbour's soil into, as well as that collected in, the neighbour's well, must on

(a) 12 M. & W. 353, 354.

the same principle be the neighbour's property; indeed, independently of this, it is well established that water collected in a well is so much taken from the common stock and reduced into possession, and become the subject of property. Now it is certainly a novel principle that by an operation on my own land, I may both excusably abstract, and lawfully convert to my own use, the underground property of my neighbour. The principle to be practical and consistent must go this full length,—it must not merely excuse the abstraction, as the unavoidable consequences of an act lawful in itself, but it must also justify the appropriation of the water abstracted, and actually make what was my neighbour's property my own, by my own deliberate act done against his will, and with a full knowledge of the injury I inflict thereby.

But again let it be conceded that this principle is a sound one, and that the landowner has a property in the water percolating through and under his land, the question still arises, and is a wholly distinct one, whether such property in the subsoil, of which the water is to be taken to be a part, may not be subjected by the owner to a servitude in respect of the mill-owner on the bank of the stream below. Why may there not be implied, from the sixty years' enjoyment, the assent and agreement of the proprietors of the bank above to permit such a transit of the water under their respective lands to the river as is essential to the proper working of the mill, without which it must be taken there never could have been that usage, on which the right is founded? What is there in the fact that the defined visible channel is wanting, when the existence and general course of the waters is known as certainly as if seen and defined, which makes such assent and agreement an unreasonable implication? It is to be remarked too, that such an implication is not inconsistent with the supposition that each landowner

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may have reserved to himself the right of the reasonable and ordinary use of the water for the enjoyment of his own land and premises: it is only a limitation on the exclusive and unreasonable use, which goes beyond the proportionate wants of the particular property, and which, as I have pointed out, cannot be enjoyed without an encroachment on the equal rights of the surrounding landowners.

For these reasons I venture to disagree with what is laid down in *Acton v. Blundell*, both as to the nature of the property in subterranean waters, and as to the reasonableness of acquiring a right to use them as against the landowner in the way of a servitude upon his land; and it is a great satisfaction to me to think that I am not without authority in this disagreement. In *Broadbent v. Ramsbotham* (25 L. J. Exch. 121), upon that case being named, I find Baron *Parke* saying, "that case decided that there is no right to a well unless the water has been used twenty years. This Court, and I believe all other Courts, disapprove of that part of the judgment which denies the natural right to the water." And in *Dickinson v. The Grand Junction Canal Company* (a), the very point now to be decided came before the Court of Exchequer, and that Court decided in favour of the plaintiffs, the owners of ancient mills, entitled to the use of two streams for the working of their mills, against the defendants who had abstracted subterranean water, which had never reached the streams, but would have done so in its natural course but for the excavation of a well and pumping from it; and whether such water was part of an underground watercourse or percolated through the strata, the Court held that the abstraction was equally actionable.

If in this sort of conflict of authorities we are to decide by what is most reasonable to hold, I cannot but think that the conclusion here must be in favour of the plaintiff. He contends only for the preservation of that which he and

(a) 7 Exch. 302.

those whom he represents have enjoyed for sixty years and more, he does not desire to deprive the defendant of the reasonable use of any rights, which are incident to him as owner of land, or necessary for the enjoyment of any habitation which may be on it, or for its better cultivation, and which are consistent with the same enjoyment by the surrounding owners of land; he appeals to the maxim so invaluable in the reconciliation of conflicting rights, and of such undoubted authority, "*Sic utere tuo ut alienum non lædas.*" The defendant, on the other hand, maintains that as owner of one piece of land the law allows him, if he will use the mechanical appliances necessary, to absorb the supply of water of the whole district—every well and pump in every property and messuage in it, however ancient, he may drain dry: he has only to sink his well deeper, and increase the power of his steam-engine, and he may do this, and dry up the river at its source, as well as intercept the latent feeders. If the law is so for him, it must be the same for each and all of his neighbours, and his exercise of his so called right might be put an end to to-morrow by any rival association, who would sink deeper than he has done, or use more powerful engines. It would seem a strange state of the law, which sanctioned such uncertainty, such conflict, and such disregard of ancient enjoyment, rather than the reasonable and peaceable exercise by all land-owners respectively, of rights which are only irreconcilable when this unreasonable extremity is introduced.

Of course the argument is not affected by the fact, that the defendant represents the Board of Health, and that the vast body of water which he abstracts is to be distributed beneficially over the whole district. He still contends for a principle, which if established would sanction all the consequences I have pointed out, which might be applied by any speculative individual or company to divert the water

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supply of any district to a distant town for profit, or which in a lesser degree might enable one manufacturer to ruin another, or destroy the long enjoyed comforts and rights of all his neighbours.

I am of opinion, therefore, that our judgment ought to be for the plaintiff.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

May 12.

RACKHAM v. MARRIOTT.

In answer to an application for payment of a debt the debtor wrote as follows:—

"I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of payment and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance."

I am much obliged to you for your forbearance."—*Held*, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the letter contained no sufficient acknowledgment or promise to take the case out of the Statute of Limitations.

THIS was an appeal by the plaintiff against the decision of the Court of Exchequer making absolute a rule for a new trial (a).

Milward argued for the plaintiff (b) (May 12).—The letter of the 26th January, 1853, amounts to a conditional promise to pay when the defendant is able; and the condition became absolute, for the jury found that the defendant was able. The letter must be read in conjunction with the previous application, which called the defendant's attention to the claim, and stated that if something was not done the debt would be barred by the statute of limitations. In *Edmonds v. Goater* (c), the defendant wrote in answer to an application for payment of a debt, "I hope to be in Hampshire very soon, when I trust everything will be arranged with W. (the creditor) agreeable to her wishes;" and that was held by Sir J. Romilly, M. R.,

(a) See the case 1 H. & N. 234.

(b) Before Cockburn, C. J., Coleridge, J., Wightman, J., Cress-

well, J., Erie, J., Williams, J., Crompton, J., and Crowder, J.

(c) 15 Beav. 416.

a sufficient promise. So in *Collis v. Stack* (a) the following answer to an application for payment was held sufficient. — “I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are for a short time longer and all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labour; this term will decide the matter.” *Tanner v. Smart* (b) put a conditional promise, with proof of ability to pay, on the same footing as an absolute promise. [*Cockburn*, C. J.—Here the defendant merely expresses a hope that circumstances will enable him,—not to pay, but to propose a satisfactory arrangement, and he says that he will not avail himself of the Statute of Limitations. That does not amount to a promise to pay, but is rather the holding out an inducement to the plaintiff to let him alone, and trust to his sense of honour.] The defendant intended the letter to operate on the mind of the plaintiff as an assurance that he would be paid, and that the defendant would not avail himself of the statute. [*Coleridge*, J.—The defendant says “now I cannot pay; but I shall have an augmentation of salary which may enable me to make a satisfactory arrangement.” *Cockburn*, C. J.—That may mean that he will pay by instalments or give a policy of insurance on his life.] In *Gardner v. McMahon* (c) the defendant’s letter contained this passage: “As you have mentioned the Limitation Act; I answer at once, that I am ready to put it out of my power to take advantage of that Act, and will immediately give you my note for whatever amount is due to you. To pay you now or within the year I am utterly unable:” and Lord *Denman* in his judgment said, “when the debtor says before the six years have elapsed, (which appears to me an important circumstance,) ‘I will waive the statute,’ it may well be supposed

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(a) 1 H. & N. 605.

(b) 6 B. & C. 603.

(c) 3 Q. B. 561.

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that the creditor on his part has forborne to sue, relying upon this undertaking as preserving his right of action in future, if it should be wanted :” and *Patteson*, J., said, “the defendant admits something to be due, though he does not agree with the plaintiff as to the amount; but he says ‘I will not avail myself of the statute, and will put it out of my power to do so.’ That if taken alone makes a promise. The expressions which follow do not qualify that promise.” [*Cockburn*, C. J., referred to *Smith v. Thorne* (a).] In that case there was no proof of ability to pay. *Waters v. The Earl of Thanet* (b) supports *Gardner v. M^cMahon*.—He also referred to *Humphreys v. Jones* (c).

Brett appeared for the defendant, but was not called upon to argue.

COCKBURN, C. J.—We are all agreed that the judgment of the Court of Exchequer ought to be affirmed. There is here an acknowledgment of a debt, but not an acknowledgment coupled with a promise to pay, either on demand, or at a future period which has elapsed, or on a condition which has been fulfilled. An acknowledgment without a promise is not sufficient to take a case out of the Statute of Limitations. Looking to the current of authorities, and more especially to the last case on the subject, *Smith v. Thorne* (a), and being of opinion that the principle is applicable to the present case, we think that the acknowledgment must amount to a promise to pay either on request, or at a future period, or on a condition. Here there is a mere expression of a hope to make some satisfactory arrangement, not an acknowledgment coupled with a promise to pay.

Judgment affirmed.

(a) 18 Q. B. 184.

(b) 2 Q. B. 757.

(c) 1 M. & W. 1.

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IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

CLERK v. LAURIE, Public Officer, &c.

May 13.

THIS was an appeal from the decision of the Court of Exchequer discharging a rule to set aside a verdict for the plaintiff (a). (The pleadings and facts fully appear in the report of the case in the Court below (b)).

Bovill (*Lush* with him) argued for the defendant (May 12) (c).—First, Mrs. Tyrwhitt had no power to revoke the authority which she gave the Union Bank to receive the dividends; secondly, assuming that she had the power, there has been no revocation in fact. If Mrs. Tyrwhitt be treated as a married woman, she was incapable of dealing with her property without the consent of her husband; if she be treated as a feme sole, she would have a right in equity to charge her separate estate, and having done so for a valuable consideration, she could not revoke the

T., a married woman, being entitled for her separate use to the dividends of certain government stock standing in the name of the plaintiff as her trustee, the plaintiff gave to the defendants, a banking Company, a power of attorney to receive the dividends and at the same time directed them to pay the dividends to T. T. directed the defendants to pay the dividends to S. & B., bankers at Brussels, to

whom she had pledged them for advances made by S. & B. to her husband. The defendants for some time paid the dividends to S. & B., but at length T. wrote to the defendants as follows:—"I think it right to inform you that in consequence of the death of one of my trustees, as well as my having left Brussels, I have been obliged to have a new power of attorney made to receive my own dividends, and I shall not therefore have occasion to trouble you to do so."—No new power of attorney was made out and the defendants received the ensuing half-yearly dividend and transmitted it to S. & B. The plaintiff having sued the defendants for that dividend—*Held*, in the Exchequer Chamber, that the letter of T. did not amount to a revocation of the authority she had given the defendants to pay the money they received on her account to S. & B., and consequently that the plaintiff could not recover.

(a) See the case 1 H. & N. 452.

(b) It was stated by the plaintiff's counsel that the letter of the 1st July, 1853, was not in evidence at the trial.

(c) Before *Cockburn, C. J., Coleridge, J., Wightman, J., Cresswell, J., Erle, J., Williams, J., Crompton, J., and Crowder, J.*

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charge. This was not a simple authority to receive the dividends, but an authority coupled with an interest, and therefore irrevocable: *Gausson v. Morton* (a). [*Williams, J.*—What is meant by an authority coupled with an interest being irrevocable is this,—that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable.] The power of attorney was given by the plaintiff, but he has taken no step to revoke it, and Mrs. Tyrwhitt is now proceeding in his name to recover money which has been paid over to Messrs. Salter & Bigwood. The payment, having been made by the direction of Mrs. Tyrwhitt, was in effect a payment to her. [*Cockburn, C. J.*—The trustee directed the bankers to receive the dividends and pay them to Mrs. Tyrwhitt, and he now sues because they have not done so: the bankers say that they have paid the dividends to Mrs. Tyrwhitt, because they have paid them according to her direction; the plaintiff says “no,” because she revoked the authority.] She had no power to do so, and the trustee never executed a fresh power of attorney. [*Wightman, J.*—Suppose Mrs. Tyrwhitt had said to the bankers, “there is a sum of money due to me, you receive it for me and pay it over to Salter & Bigwood who have made me advances;” could she, after the bankers had received the money but before they paid it over, have required them to pay it to her?] She could not revoke the authority to pay to Salter & Bigwood. [*Erle, J.*—In equity, a married woman having a separate estate, without a clause of anticipation, may create a charge which her trustee must strictly perform.] Here there was no interference by the trustee until after the money was paid over to Salter & Bigwood. [*Erle, J.*—The moment the money

(a) 10 B. & C. 731.

was in the hands of the bank, it became the property of the husband.]

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J. B. Karlake, for the plaintiff.—The question is whether, as between the plaintiff and the Union Bank, the issue which was on the defendant has been proved by him. It was not suggested in the Court below that the letter of the 5th of October, 1855, did not operate as a revocation of the authority to pay the dividends to Salter & Bigwood: it was treated at the trial, and considered by the Judge as being in point of fact a revocation, and the only question argued below was whether in point of law the authority could be revoked. The defendant has not proved what he undertook to prove; viz., that the Union Bank paid the dividends to Mrs. Tyrwhitt by payment to Salter & Bigwood. It does not appear by the record that the plaintiff is a trustee, and if not, he might have revoked at any time. No doubt Mrs. Tyrwhitt might make a valid assignment of the dividends, but the question is not whether she has done something which operates in equity as a valid assignment of her separate estate, but whether, as against the plaintiff, the Union Bank has fulfilled its contract by paying the dividends to Mrs. Tyrwhitt. If Salter & Bigwood filed a bill in equity against the plaintiff as trustee, alleging that Mrs. Tyrwhitt had assigned the dividends to them, of which the Union Bank had notice, the plaintiff might answer that before he had notice of that assignment, other persons had made advances to Mrs. Tyrwhitt on the security of her separate estate; and then those parties would be brought before the Court and the priority of claim ascertained. The defendant is bound to shew that there has been a valid irrevocable assignment of the dividends by Mrs. Tyrwhitt to Salter & Bigwood; but there was nothing more than a mere direction to the Union Bank to pay over any dividends which

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might come to their hands, in liquidation of the advances made to Mrs. Tyrwhitt. The bank now sets up the *jus tertii*, to prevent the plaintiff, the owner of the money, from receiving it. But the plaintiff's claim arises out of the contract between him and the bank; and there is no evidence that he was a party to the arrangement between Mrs. Tyrwhitt and Salter & Bigwood. It is a question for a Court of equity, whether there was a valid assignment of Mrs. Tyrwhitt's separate estate.—He referred to *Tullett v. Armstrong* (a).

Bovill, in reply.—The plaintiff's case proceeds on the assumption that the Union Bank was authorized to receive the dividends; and it is the subsequent application of them which is complained of. The letter of the 5th October, 1855, cannot therefore be used as shewing a revocation of the authority to receive the dividends. It is clear that a feme covert may charge her separate estate: *Story's Equity Jurisprudence*, s. 1393; *Roper's Husband and Wife*, Vol. 2, p. 242, 2nd. ed. The rule of law is thus laid down in *Story on Agency*, s. 477:—"But where an authority or power is coupled with an interest or where it is given for a valuable consideration, or where it is a part of a security, there, unless there is an express stipulation that it shall be revocable, it is from its own nature and character, in contemplation of law, irrevocable, whether it is expressed to be so upon the face of the instrument conferring the authority or not." [*Williams, J.*, referred to *Smart v. Sanders* (b).]

Cur. adv. vult.

The judgment of the Court was now delivered by

(a) 4 Beav. 319.

(b) 5 C. B. 895.

WIGHTMAN, J.—We are of opinion that, under the circumstances stated to us upon this appeal, the plaintiff is entitled to recover; and we come to this conclusion upon the ground that there has not been any revocation of the authority given to the banking Company either to receive the dividends upon the stock standing in the name of the plaintiff, or to apply them to the payment of the debt from Mr. and Mrs. Tyrwhitt when received.

The authority to receive the dividends and pay them to Mrs. Tyrwhitt has never been revoked by the plaintiff, who gave it. Mrs. Tyrwhitt had no power to revoke that authority, nor does the plaintiff complain that the defendants were not warranted in receiving the dividends; indeed the action itself affirms their right to receive them, but the ground of complaint is, that they ought to have paid the money to Mrs. Tyrwhitt herself,—that though a payment by her direction to Messrs. Salter & Co. might be equivalent to a payment to herself, yet that the authority and direction, which she had given to the defendants, to pay the money which they received for her, to Messrs. Salter & Co., had been revoked by her before the last payment, by the letter set out in the case and that in consequence their subsequent payment to Messrs. Salter & Co. was in their own wrong. We are of opinion that that letter does not amount to a revocation of the authority she had given the defendants to pay the money they received on her account to Messrs. Salter & Co.: there is no allusion whatever to them, or to the authority to pay them when the money was received. She merely says that in consequence of the death of one of the trustees she has been obliged to have a new power of attorney made to receive her own dividends, and that she would not trouble them any longer to receive them. No new power was made, and the defendant received the

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dividends as before; and applied them as they had been previously directed by her to apply them, which application she had never revoked.

We have come to this conclusion upon a ground not adverted to in the judgment of the Court of Exchequer, and it has therefore become unnecessary to consider the grounds upon which that judgment was pronounced.

Judgment of nonsuit to be entered.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

SCOTT v. THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF MANCHESTER.

May 13.

The defendants, a municipal corporation, were empowered by act of parliament to construct gas works and to supply gas and sell and dispose of the coke: the surplus profits to go in reduction

THIS was a proceeding in error on the judgment of the Court of Exchequer for the plaintiff. The pleadings and judgment of the Court below are reported, *ante*, Vol. 1, p. 59.

Hugh Hill (with whom were *Monk* and *Milhoard*) argued for the defendants (*a*).—The defendants are mere trustees for public purposes, acting in the execution of a public act of the water rates and otherwise towards the improvement of the town. In an action against the defendants, the declaration alleged that they employed workmen to lay down the pipes, who so negligently conducted themselves that a piece of metal was projected against the plaintiff. Plea.—That the grievances were *bonâ fide* done by the defendants in the course of executing the powers conferred on them by their Act, and without any neglect, misconduct, &c., of the defendants, otherwise than by their workmen or one of them, and that the workmen were well skilled and qualified and proper persons to be employed by them.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plea was no answer to the action.

(*a*) Before *Cockburn*, C. J., *ton*, J., *Crowder*, J., and *Willes*,
Wightman, J., *Erle*, J., *Crompton*, J.

parliament (a). Now, it is a general rule, that trustees or commissioners for carrying into execution a public act of parliament, not acting for their personal advantage, but in performance of a public duty, are not responsible for the

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(a) By 14 & 15 Vict. c. cxix., s. 6,—“It shall be lawful for the council from time to time to construct and maintain such gasworks and apparatus, and such buildings with approaches thereto, &c. * * * and to supply gas upon such terms as shall be agreed upon between them and the persons supplied therewith, and to sell and dispose of the coke and other residuum arising from the materials used in the manufacture of gas, in such manner as the council may think proper.”

Sect. 13. “Whereas, by 7 & 8 Vict. c. xli., provisions were enacted, directing the application of monies to be received by the council from the gasworks in paying off the mortgages, &c., and certain expences connected with their gasworks, and as to the residue of such monies in and towards the improvement of the township of Manchester * * * and it is expedient that the council should be authorized to apply, for a limited period, certain portions of such residue in reduction of the expence to the inhabitants of supplying the borough with water; be it enacted, that it shall be lawful for the council from time to time, during the period of ten years next after the passing of this Act, to appropriate and apply such portion of the said residue as they may think fit, not exceeding one moiety thereof, in or

towards payment of the annual expences to be incurred in supplying the inhabitants of the borough with water, and in reduction of the water rates authorized to be levied by ‘The Manchester Corporation Waterworks Act, 1847;’ and subject to such appropriation and application, all the provisions contained in the 141st, 142nd and 143rd sections of the 7 & 8 Vict. c. xli., shall, notwithstanding the passing of this Act, continue in full force and effect; provided that any agreement already entered into and now subsisting in reference to the appropriation of gas profits or any part thereof in or for the benefit of any township within the borough shall, at the expiration of the said ten years, be as binding and valid in all respects as the same now is or was at the time of the passing of this Act.”

The 7 & 8 Vict. c. xli., s. 141, is as follows:—“From and after the passing of this Act, all sums of money to be received by the council for gas, &c., and profit to arise or be made from carrying on the said works, &c., shall be applied in the manner following (that is to say); in the first place in paying and discharging the costs, charges, and expences of keeping up and carrying on the said works, and of making good all damage and injury occasion-

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consequences of acts done within the scope of their authority. To render them liable, it must be shewn that they acted in excess of their authority, or in abuse thereof, by acting arbitrarily, wantonly, or oppressively in the mode of carrying the Act into execution; and if they do not personally interfere, and employ competent persons in executing the powers of the Act, they are not liable for the negligence of those persons. The 14 & 15 Vict. c. cxix., s. 13, directs that such portion of the residue of the profits from the gas works as the council shall think fit, not exceeding one moiety, may be applied by them towards payment of the annual expenses to be incurred in supplying the inhabitants of the borough with water and in reduction of the water rates authorized to be levied by "the Manchester Corporation Water Works Act, 1847." The 7 & 8 Vict. c. xli., s. 141, also relates to the application of monies to be re-

ed by laying down any mains, pipes, or other apparatus, &c.; and in the next place in paying all the interest which may be due on any monies borrowed under the recited Acts, or any of them, and on any mortgages, &c., or to pay off the said last mentioned monies; and in the next place in paying, &c., every annuity which shall be granted, by the council, under the authority of this Act, &c.; and in the next place in setting aside or appropriating such a sum annually as, &c., a sinking fund, for the liquidation of the said principal monies in the manner hereinafter directed; and in the next place in paying all the interest which may be due on any mortgages granted under this Act, for securing monies borrowed to pay off the sums borrowed under the said recited Act, 1 & 2 Geo. 4, or for

the purpose of effecting the alterations and improvements contemplated by this Act; and in the next place in paying every annuity, &c.; and in the next place in setting aside or appropriating a sum annually as a sinking fund, for the liquidation of the said monies, &c.; and after making the several payments and appropriations hereinbefore directed, the surplus of the said gas rents and profits shall from time to time be applied by the council in and towards the improvement of the township of Manchester, in such manner as the council or the committee, &c., shall think proper, and without being subject to any restrictions in the said Acts, or any of them, contained as to the amount of the sum to be expended in any of such improvements."

ceived by the council for gas,—they are to be applied for keeping up the works, making good any damage, paying interest on monies borrowed, and the like,—and the surplus is to be applied by the council in and towards the improvement of the town of Manchester in such manner as the council shall think proper. In the case of *Sutton v. Clarke* (a), where the defendants were trustees under a turnpike Act: *Gibbs*, C. J., said,—“The trustees, as they derived no benefit from their office, are not answerable for any damage which may have accrued in consequence of any act done by them within the limits of their authority, provided they used their best skill and diligence and obtained the best advice that was to be procured.” In *The Governor and Company of the British Cast Plate Manufacturers v. Meredith* (b), it was held that where the acts of commissioners appointed by a Paving Act occasioned damage to an individual without any excess of jurisdiction on their part, the commissioners were not liable to an action. [*Wightman*, J.—Does the plea raise this point? Are persons who are guilty of negligence, misconduct and mismanagement “competent persons?” This is not a case where a thing done strictly in accordance with the directions of the Act produced the mischief. *Erle*, J.—It was an accident which happened while the defendants were acting in the execution of the powers of the Act.] *Boulton v. Crowther* (c) shews that turnpike trustees are not liable to an action for a consequential injury resulting from an act which they are authorized to do. *Hall v. Smith* (d) goes the full length of this case; it was there held that clerks of commissioners entrusted with the conduct of public works were not liable in damages for an injury occasioned by the negligence of

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(a) 1 Marsh. 429.

(c) 2 B. & C. 703.

(b) 4 T. R. 794.

(d) 2 Bing. 156.

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artificers employed under their authority. [*Wightman*, J. —In that case the work was done by a contractor.] The judgment did not proceed on that ground. In *Duncan v. Findlater* (a), in which all these cases were commented on, Lord *Cottenham* quoted the judgment of Lord *Wynford* in *Hall v. Smith*, that “if commissioners under an act of parliament order something to be done which is not within the scope of their authority, or are themselves guilty of negligence in doing that which they are impowered to do, they render themselves liable to an action; but they are not answerable for the misconduct of such as they are obliged to employ.” He said that this was the true distinction, and that the law thus laid down had ever since been recognised in England. Here, it appears that the corporation of Manchester were carrying out the purposes of the Act; they were not guilty of negligence themselves, and had employed skilled persons to do the work; therefore they are not responsible.

Atherton (with whom was *Spinks*), for the plaintiff.—Powers were conferred upon the defendants to lay down gas pipes. They did not think proper to employ a contractor, but chose to undertake the execution of the works themselves. It may be that the cases cited decide that where an individual is clothed with an authority and a duty, so that he cannot be said to be a volunteer, he is not personally responsible for injury resulting from acts which he is compelled to do. Trustees of a turnpike road have a duty cast upon them, viz. to employ persons to repair the road: if they do so bonâ fide, they fulfil their duty; and not having the control over any fund, out of which to reimburse themselves, are not responsible for injuries occa-

(a) 6 Cl. & F. 894.

sioned by the negligence of the persons employed by them. Here, however, there is a fund out of which the council may make compensation to persons injured. The making of gas is an adventure carried on for purposes of profit. Before the passing of 6 & 7 Vict. c. xvii. and 7 & 8 Vict. c. xli., there existed a gas Company, incorporated under a local Act, the property and powers of which were by those Acts vested in the council. By the 14 & 15 Vict. c. cxix., s. 6, the council have power to construct and maintain the gasworks, and to supply gas and to sell and dispose of the coke. By the 13th section of that Act, and by 7 & 8 Vict. c. xli., s. 141, the surplus profits of the gas are to go in reduction of the water rates and otherwise towards the improvement of the township of Manchester. The 14 & 15 Vict. c. cxix., s. 6, shews that the works are carried on by the corporation voluntarily. If they were undersold by another company, they would not be bound to carry on the works.

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Hugh Hill, in reply.—If the corporation are liable to make compensation to the plaintiff, it must be under the 141st section of the 7 & 8 Vict. c. xli. No action can be maintained, because a particular remedy is given by the Act: *The Governor and Company of the British Cast Plate Manufacturers v. Meredith (a)*. [*Crompton, J.*—That clause only applies where damage results from an act expressly authorized by the statute.]

COCKBURN, C. J.—This case is distinguishable from those cited and relied on by Mr. *Hill*. Here, though the individuals composing the corporation acted gratuitously, yet the corporation and the township derive a profit from the

(a) 4 T. R. 794.

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carrying on of the works. We are all of opinion that the judgment of the Court below must be affirmed.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

May 12.

GRAVES v. LEGG and Others.

The defendants, London merchants, employed a broker at Liverpool to purchase some wool. The broker negotiated a sale by the plaintiff to the defendants of certain bales deliverable at Odessa, "the names of the vessels to be declared as soon as the wools were shipped." In this transaction the broker acted for both plaintiff and defendants. By the custom of Liverpool, where a con-

tract contained a stipulation that notice of an event should be given by the vendor to the vendee, it was usual for the vendor to give the notice to the broker who communicated it to the vendee. —*Held*, in the Exchequer Chamber, affirming the decision of the Court of Exchequer, that the defendants were bound by such usage, and therefore that a notice by the plaintiff to the broker of the names of the vessels on which the wools were shipped was a performance of that stipulation, although the broker omitted to communicate them to the defendants.

THIS was an appeal by the defendants against the decision of the Court of Exchequer in discharging a rule to enter a verdict for the defendants on a point reserved at the trial. The case set out the pleadings (which fully appear in the reports, 9 Exch. 709, 11 Exch. 642), and a transcript of the learned Judge's notes of the trial. The effect of the evidence was, that according to the usage of Liverpool, where there is one broker between seller and buyer, and by the terms of the contract, notice of any event is to be given by the seller to the buyer; the usage is for the seller to give it to the broker, who forwards it to the buyer.

Hugh Hill (*Kemplay* with him), argued for the defendants (a).—The usage of merchants at Liverpool is not

(a) Before *Cockburn, C. J., well, J., Erle, J., Williams, J., Coleridge, J., Wightman, J., Cress- Crompton, J., and Crowder, J.*

binding on the defendants, who are London merchants. The brokers were not the agents of the defendants for the purpose of receiving the notice for them. The wool was to be laid down either at Liverpool, Hull, or London, and the object of the notice was that the purchasers might be made aware of the vessel on which the wool was shipped and to what place it was coming. It was a stipulation for their benefit: *Graves v. Legg* (a). The brokers were not, by force of their employment as brokers, agents to receive the notice. They were specially employed to make the contract, and, after it was made, their authority and power ceased. In *Story on Agency*, s. 28, it is said,—“The true definition of a broker seems to be, that he is an agent, employed to make bargains and contracts between other persons, in matters of trade, commerce, or navigation, for a compensation, commonly called brokerage.” In *Baring v. Corrie* (b), the Court pointed out the distinction between the office of broker and factor. *Milford v. Hughes* (c) also shews what the business of a broker is. The authority of an agent only to sell is at an end by the sale: thus, an auctioneer after the sale ceases to be the agent of the vendor, and consequently has no authority to treat of the terms on which a title is to be made: *Seton v. Slade* (d); *Paley’s Principal and Agent*, p. 188, 3rd ed. Here there was no evidence that the brokers had any express or implied authority, apart from the usage, to receive the notice on behalf of the defendants. It is contended, however, that the usage is binding on them, but according to the evidence it is the practice for the seller to give notice to his broker, and no instance is known in which the broker has neglected to forward the notice to the purchaser’s broker, so that the question has never arisen as to whether the purchaser is

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(a) 9 Exch. 709, 717.

(c) 16 M. & W. 174.

(b) 2 B. & Ald. 137.

(d) 7 Ves. 276.

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to suffer for the default of the broker when only one is employed. [*Cockburn*, C. J.—It was admitted at the trial, that when a contract of this kind was made by one broker between seller and buyer, it was the usage for the seller to give notice of the shipment to the broker.] In *Partridge v. The Bank of England* (a), *Tindal*, C. J., distinguishes between a *practice of trade* and a *custom* properly so called. This usage comes within the former definition. In the case of mercantile contracts, evidence of custom and usage is admissible either to annex incidents: *Hutton v. Warren* (b), *Syers v. Jonas* (c); or explain the meaning of particular expressions, or a local mode of performing the contract: *Cuthbert v. Cumming* (d), *Brown v. Byrne* (e). None of those instances apply here. The plaintiff, who is a merchant in London, is not bound by the usage of Liverpool. [*Cresswell*, J.—Where a broker is employed to purchase in a particular market, he is presumed to be invested with authority to purchase according to the usage of that market.]

Knowles and *Blackburn* appeared for the plaintiff, but were not called upon to argue.

COCKBURN, C. J.—We are of opinion that the decision of the Court of Exchequer is right. The contract requires that notice of the shipment should be given by the seller to the buyer. Here the notice was given by the seller to the broker who acted for both parties. There was evidence that, according to the usage of Liverpool, if notice is given to the buyer's broker that is equivalent to notice to the buyer himself; and the case is the same whether there be two brokers,

(a) 9 Q. B. 396.

(d) 11 Exch. 405.

(b) 1 M. & W. 466.

(e) 3 E. & B. 703.

(c) 2 Exch. 111.

one for the seller and the other for the buyer, or one broker who acts for both; the custom of the Liverpool market being that in such case notice to the broker as the agent of the buyer is notice to the buyer. The only question is whether, when a merchant residing in London contracts with a Liverpool merchant in Liverpool, he is bound by the usage of trade at Liverpool. We think that as he employed an agent at Liverpool to make a contract there, it must be taken to have been made with all the incidents of a contract entered into at Liverpool, and one is that notice to the buyer's agent is notice to the principal. The judgment of the Court below must therefore be affirmed.

Judgment affirmed.

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IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

ROBERTS v. SMITH and Another.

May 13.

DECLARATION.—That before and until and at the time of the plaintiff's entering into the service of the defendants and of the committing of the grievances, &c., the defendants carried on the business of builders, and

A declaration stated that the plaintiff, a bricklayer, entered into the service of the defendants upon the terms

that they should take and use all due, reasonable and proper means and precautions in order to prevent accident, damage or injury, or unreasonable or unnecessary risk, or damage from happening or occurring to the plaintiff in the performance of his duty as such servant; that the defendants did not take such reasonable precautions, and by reason thereof, and of the neglect of duty of the defendants, the plaintiff was employed on a scaffold which, for want of such precautions, was rotten and unsafe, which the defendants knew, and whereof the plaintiff was wholly ignorant, and in consequence thereof a part of the scaffold broke and the plaintiff fell to the ground. Pleas.—First: Not guilty. Second: Traverse of employment on the terms alleged. At the trial, it was proved that the defendants had employed a labourer to erect the scaffold. The materials for the scaffold were in bad condition. The labourer broke several of the putlogs in trying them. One of the defendants told him to break no more, that the putlogs would do very well. The labourer used such as he thought sound. One of the putlogs so used having given way the scaffold fell, and the plaintiff was injured. On this evidence, the Judge at the trial directed a nonsuit.—*Held*, on appeal to the Court of Exchequer Chamber, that there was evidence to go to the jury of the liability of the defendants.

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the plaintiff, being a bricklayer, entered into the service of the defendants in the way of their trade upon the terms and conditions, amongst others, that the defendants should take and use all due, reasonable and proper means and precautions in order to prevent accident, damage or injury, or unreasonable and unnecessary risk or danger from happening or occurring to the plaintiff in the performance of his duty as such servant of the defendants; and although the plaintiff did all things, &c., yet the defendants did not take or use due or reasonable, or proper means or precautions, but altogether omitted so to do; and by reason thereof, and of the default and neglect of duty of the defendants, the plaintiff was directed and employed by the defendants, as such their servant, to perform work upon the wall of a house, and for that purpose to remain at a great height from the ground upon a scaffold affixed to such house, and which scaffold, for want of the use of such means or precautions, and by reason of the negligence and default of the defendants, was and remained constructed very unsafely and unsecurely, and in such a defective, rotten and improper state and condition as to render it dangerous to remain upon the same for the purpose of doing the work, which the defendants then well knew, but whereof the plaintiff was wholly ignorant; and in consequence thereof, whilst the plaintiff was so engaged and employed, a part of the scaffold broke and gave way, and the plaintiff was precipitated to the ground, and his thigh was thereby fractured, &c.

Pleas.—First: Not guilty. Second: Traverse of the employment upon the terms alleged. Issues thereon.

The case was tried before *Pollock*, C. B., at the sittings at Westminster after last Michaelmas Term, when the following evidence was given for the plaintiff:—

The plaintiff stated that he was a bricklayer in defendants' employment. On the 16th of July, in consequence of

the breaking of a putlog (a), the plaintiff was precipitated from a scaffold into the area and broke his thigh. Another witness, a labourer, said:—"I was employed to get the scaffolding out of the defendants' yard and to erect the same. It is usual to examine the poles, &c. I examined the materials and found them in bad condition, light and wormeaten. I broke several that were rotten and wormeaten. The defendant, William Smith, came afterwards: he asked who broke the putlogs; I told him I did. Smith then said, 'You have no business to do so; they will do very well as there are no bricks or mortar to be put upon them: don't break any more.' I put aside such as I thought sound. I used three putlogs where one would have done. I have been a labourer and scaffolder for twenty-five years. A sound putlog ought to bear from 15 cwt. to a ton, or twenty men." Another witness, on cross-examination, stated,— "The putlog which broke was the strongest of the three: I thought it was safe for the weight which was going on it." Other witnesses stated that the putlogs and poles were both rotten. At the conclusion of the plaintiff's case, it was objected that there was no evidence to go to the jury; and on that ground the Lord Chief Baron directed a nonsuit with liberty to the plaintiff to move for a new trial, if there was any evidence to go to the jury.

A rule was afterwards obtained by the plaintiff, calling upon the defendants to shew cause why the nonsuit should not be set aside and a new trial had on the ground that the evidence ought to have been left to the jury. It was agreed between the plaintiff's and defendants' counsel (in order that the plaintiff might appeal) that this rule should be discharged by the Court of Exchequer, and against such ruling this appeal was brought.

(a) Putlogs,—pieces of timber or short poles about seven foot long, to bear the boards they stand on to work, and to lay bricks and mortar upon.—*Moxon's Mechanical Exercises*—*Johnson's Dict.*

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Temple (with whom was *C. Wray Lewis*), for the plaintiff, now moved for a new trial.—The accident was caused by the improper conduct of the defendant Smith, who prevented the servant, whom he had employed to erect the scaffold, from trying the strength of the putlogs which he was about to use. The principle which governs these cases is laid down in *Paterson v. Wallace* (a). That was an action against the owners of a mine, by the family of a workman, who was killed in the mine by the falling of a stone. It was proved that one Snedden was the underground manager of the mine; that there was some dispute about not going to work on the day when the accident happened, when the workmen pointed to the roof and particularly to the stone, which afterwards fell, as being in a very dangerous condition. Snedden said they were afraid of snow when none fell. The deceased remonstrated, and Snedden ultimately agreed that the stone should be removed. The deceased, not waiting for the removal, passed under the stone and was killed by its falling. Lord *Cranworth*, C., said that it was necessary for the pursuers to establish two propositions: first, that the stone was in a dangerous position owing to the negligence of the master; and next, that the workman whose life was forfeited lost it by reason of that negligence, and not of any rashness on his own part. He also laid down the rule, "When a master employs a servant in a work of a dangerous character he is bound to take all reasonable precautions for the safety of that workman" * * * It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch or secure, when in fact the master knows, or ought to know, that it is not so; and if from any negligence in this respect damage arise, the master is responsible." This ruling was confirmed in the case of *Brydon v. Stewart* (b). If it had

(a) 1 Macqueen, 748.

(b) 2 Macqueen, 30.

been proved that every putlog was in a rotten state, that might have been evidence for the jury that reasonable care had not been taken by the master. Here, however, there was *express* evidence of recklessness on the part of the master. [*Cockburn*, C. J.—It is clear that there was evidence to go to the jury that the accident was caused by the negligence of the master; the question is, not whether the master believed the putlogs sufficiently strong, but whether he was justified in believing them to be so.]

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Knowles (with whom was *Barnard*), for the defendants, shewed cause.—The declaration alleges that the plaintiff entered into the service of the defendants upon the terms that they should use all due means and precautions in order to prevent accident or injury, or unreasonable or unnecessary risk or damage from happening to the plaintiff in the performance of his duty as a servant. Now the law casts no duty upon a master in a case like the present, except that of taking due care in selecting his servants. [*Cockburn*, C. J.—Suppose he employs competent servants, but gives them materials that are rotten and cannot safely be used. *Wightman*, J.—Suppose that he does so knowing the materials to be rotten.] The only duty is to take reasonable care in providing proper materials and servants. [*Crompton*, J.—The allegation means no more than that the defendant was to do all that the law required of him.] In *Seymour v. Maddox* (a), it was held that the owner of a theatre was not liable for injury to an actor, who fell through a hole in the floor under the stage which was not lighted or fenced. [*Erle*, J.—In that case the arrangement was an indispensable part of the stage mechanism.] In *Tarrant v. Webb* (b), certain scaffolding had been erected by

(a) 16 Q. B. 326.

(b) 18 C. B. 797.

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a servant of the defendant, named Martin. Some painters employed said it wanted an additional upright, and the defendant said that if Martin hearkened to the painters he would have nothing else to do. The accident having occurred for want of the additional upright, *Crowder, J.*, told the jury that if they were of opinion that the scaffolding was erected under the personal direction and interference of the defendant and was insufficient, or that the person employed by the defendant for the purpose of erecting it was an incompetent person, the plaintiff was entitled to recover. The jury having found a verdict for the plaintiff, intimating that Martin was not a competent person, the Court granted a new trial. [*Crompton, J.*—That part of the ruling of my brother *Crowder*, which applies to this case, is against the defendants. *Cockburn, C. J.*—There the plaintiffs sought to make the master responsible for the negligence of the servant. Here it is the master who was himself guilty of negligence. *Crowder, J.*—The master there had nothing to do with the scaffolding.]

COCKBURN, C. J.—We are all of opinion that there must be a new trial, and that it is quite clear that there was evidence to go to the jury.

WILLES, J.—It must be understood that this rule is granted upon the ground that there appears to have been evidence of the personal interference and negligence of the master.

Rule absolute for a new trial.

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TRINITY TERM, 20 VICT.

IN RE WILLIAM BAKER.

1857.

June 1, 2.

SCOTLAND (May 29th) had obtained a rule for a writ of habeas corpus to issue, directed to the governor of the B. agreed with H. & Co. to serve them as a potter from the 11th Nov.

1856 till the 11th Nov. 1857. He entered the service, but a dispute having arisen between him and his employers as to his wages, he left the service on the 10th March, 1857. On the 18th March he was convicted by a justice of the peace for unlawfully absenting himself from his employer's service, and sentenced to one month's imprisonment, with hard labour, in the House of Correction. On the 17th April he was discharged from prison, and on the 29th was requested by H. & Co. to return to their service, but refused. On the 13th May he was again convicted by a justice, on a charge of unlawfully absenting himself from the service of H. & Co., and sentenced to one month's imprisonment, with hard labour, in the House of Correction. A writ of habeas corpus having issued, the governor of the House of Correction returned that he held B. in custody under the warrant of a justice, which after reciting that complaint on oath hath been made to him that B. on the 11th November last contracted and agreed with H. & Co. to serve them as a potter, in their business as potters, until the 11th November next, and "having entered upon and worked under such agreement, and the term of his contract being unexpired, the said B. did on the 29th April last unlawfully misdeemean and misconduct himself in his said service by neglecting and absenting himself from his said master's service without the leave of his said master, contrary to the provisions of the statute in such case made and provided. And, whereas the said B. being now brought before me the said justice to answer the said complaint, and I having duly examined into the nature thereof: Do adjudge the said complaint to be true, it appearing to me as well upon the examination on oath of M. in the presence of the said B. as otherwise, that the said B. having contracted as aforesaid to serve the said H. & Co. as a potter in their business of potters, and the term of his contract being unexpired, did on the 29th of April last misdeemean and misconduct himself in his said service, by neglecting and absenting himself from his said master's service without the leave of his said master: I do therefore convict him the said B. of the said offence, and do order and adjudge that the said B. for his said offence be committed to the House of Correction at S., there to remain and be held to hard labour for the space of one calendar month. These are therefore to command you," &c.

Held: First, that, assuming the contract was dissolved by the conviction, affidavits might be used for the purpose of shewing that the absenting in respect of which the second conviction took place was the not returning to the service after the expiration of the imprisonment under the first conviction, for in that case the justice had no jurisdiction: *Per Pollock, C. B., and Watson, B.; Martin, B., dubitante, Bramwell, B., dissentiente.*

Secondly: That the contract was not dissolved by the first conviction: *Per Bramwell, B. and Watson, B.; Pollock, C. B., dissentiente, Martin, B., dubitante.*

Thirdly: That the conviction was not open to the objection that it did not affirmatively appear that B. had entered the service, or to the objection that the adjudication was made on evidence other than that taken in the presence of B.: *Per totam Curiam.*

Fourthly: That the conviction was bad, inasmuch as the justice had not adjudicated as to an abatement of wages during the period of imprisonment: *Watson, B., dissentiente.*

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County prison at Stafford, to bring up the body of William Baker. The application was made on an affidavit (a) which stated that Baker had entered into an agreement with Messrs. Hawley to serve them as a potter from the 11th of November, 1856, till the 11th of November, 1857: that he entered on the service under the agreement, but a dispute having arisen between him and his employers as to his wages, he left the service on the 10th of March, 1857. On the 18th of March, 1857, he attended before a justice of the peace, in obedience to a previous summons, on a charge of unlawfully absenting himself from the service of his employers on the 10th of March, and was convicted and sentenced to one month's imprisonment with hard labour in the House of Correction. He underwent the sentence, and on the 17th of April was discharged from prison, when he entered the service of another person. On the 29th of April he was requested by Messrs. Hawley to return to their service, but he refused. On the 13th of May he was again brought before a justice of the peace, on a charge of having unlawfully absented himself from the service of Messrs. Hawley on the 29th of April, and was convicted and sentenced to one month's imprisonment, with hard labour, in the House of Correction, under which sentence he was in prison.

In the present term (May 27), *Scotland* made a similar application to the Court of Queen's Bench for a writ of habeas corpus, to bring up the body of William Baker, but that Court refused to grant the application.

On the 1st June the prisoner was brought before this Court, in obedience to the writ of habeas corpus, by the governor of the prison, who returned that he held him in custody under the following warrant of commitment:—

(a) The Court intimated a be used, but expressed a wish to
doubt whether the affidavit could hear the point argued.

County of } To all constables, &c., and to the keeper
 Stafford, } of the House of Correction at Stafford,
 to wit. } or his deputy.

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Whereas, complaint upon oath hath been made unto me, Thomas Baily Rose, Esquire, one of her Majesty's justices of the peace acting in and for the county of Stafford, by James Mayer of, &c., agent for Felix Hawley and others of, &c., potters; that William Baker, late of Langton in the said county, potter, did on 11th day of November last, contract and agree with the said Felix Hulme Hawley and his copartners to serve them as a potter in their business of potters at the parish of Stoke-upon-Trent in the said county under a written contract for a certain time (to wit), until the 11th day of November next, and having entered upon and worked under such agreement and the term of his contract being unexpired, the said William Baker did, on the 29th day of April last, unlawfully misdemean and misconduct himself in his said service by neglecting and absenting himself from his said master's service without the leave of his said master, without having given to his said master any notice thereof, and without any sufficient reason for so doing, contrary to the provisions of the statute in such case made and provided. And, whereas the said William Baker being now brought before me the said justice, in pursuance of my warrant issued against him to answer to the said complaint, and I having duly examined into the nature thereof: Do adjudge the said complaint to be true, in appearing to me as well upon the examination on oath of the said James Mayer in the presence of the said William Baker, as otherwise, that the said William Baker having contracted as aforesaid to serve the said Felix Hawley and his copartners as a potter in their business of potters, and the term of his contract being

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unexpired, did, on the 29th day of April last misdemean and misconduct himself in his said service, by neglecting and absenting himself from his said master's service without the leave of his said master, and without giving to his said master any notice thereof, and without any sufficient reason for so doing: I do therefore convict him the said William Baker of his said offence, and do order and adjudge that the said William Baker for his said offence be committed to the House of Correction at Stafford aforesaid, there to remain and be held to hard labour for the space of one calendar month. These are therefore to command you the said constable forthwith to convey the said William Baker to the House of Correction at Stafford aforesaid and deliver him to the keeper thereof together with this warrant. And I do hereby command you the said keeper to receive the said William Baker into your custody in the said House of Correction at Stafford aforesaid, there to remain and be held to hard labour for the space of one calendar month from the date hereof, and for your so doing this shall be to you and each of you a sufficient warrant.— Given under my hand and seal this 13th day of May, A.D. 1857, at Langton in the said county.

(Signed and sealed) THOS. B. ROSE.

Scotland (with whom was *Wheeler*) moved for the prisoner's discharge.—First, affidavits may be used for the purpose of shewing that the justice had no jurisdiction. *In re Bailey*(a) is an express authority to that effect. There the prisoner had been convicted under the 4 Geo. 4, c. 34, and on an application for his discharge, Lord *Campbell*, C. J., said:—"I think that the prisoner may use affidavits to shew that there was no evidence before the

(a) 3 E. & B. 607.

justice from which he could reasonably infer that there was a contract creating the relation of master and servant, as that would shew that there was no jurisdiction in the justice. But, if there was such evidence, it is immaterial to shew that there was other evidence from which the justice might have inferred the contrary, for that would only go to shew that the finding of the justice on a matter within his jurisdiction was wrong." [Pollock, C. B.—Affidavits may be used for the purpose of shewing that there was no evidence at all, but if there is conflicting evidence, it is for the justice to decide upon it.] In order to give the justice jurisdiction, there must be a contract in writing and an omission to enter the service; or an entering into the service, and an absenting therefrom; and unless affidavits are received the justice may give himself jurisdiction by finding those matters when in fact they did not exist: *Regina v. Bolton* (a).

Secondly, upon the facts disclosed by the affidavit, the justice had no jurisdiction. This case is not within the first branch of the 3rd section of the 4 Geo. 4, c. 34 (b),

(a) 1 Q. B. 66.

(b) Sect. 3 enacts,—“That if any servant in husbandry or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, shall contract with any person or persons whomsoever, to serve him, her, or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract (such contract being in writing, and signed by the contracting parties), or having entered into such service shall absent himself

or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same, then and in every such case it shall may be lawful for any justice of the peace of the county or place where such servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, shall have so contracted,

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which has reference to cases where the workman has contracted in writing to serve and has not entered into the service. The section goes on to say "or having entered into such service shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed," &c., it shall be lawful for the justice to act. That means leaving the service, the party being at the time in the service; as in this case, on the occasion of the first conviction there had been an entry on the service and an absenting therefrom in the sense of the act of parliament. But it was never intended that the Act should extend to a workman who does not return to his service

or be employed or be found, and such justice is hereby authorized and empowered, upon complaint thereof made upon oath to him by the person or persons, or any of them with whom such servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person shall have so contracted, or by his her or their steward, manager, or agent, which oath such justice is hereby empowered to administer, to issue his warrant for the apprehending every such servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, and to examine into the nature of the complaint; and if it shall appear to such justice that any such servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter,

labourer, or other person, shall not have fulfilled such contract, or hath been guilty of any other misconduct, or misdemeanor as aforesaid, it shall and may be lawful for such justice to commit every such person to the House of Correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a proportionable part of his or her wages, for and during such period as he or she shall be so confined in the House of Correction, or in lieu thereof, to punish the offender by abating the whole or any part of his or her wages, or to discharge such servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person from his or her contract, service, or employment, which discharge shall be given under the hand and seal of such justice gratis."

after his conviction, otherwise he would in effect be convicted, not for leaving, but for not returning to the service, or for the same leaving as before. When the second conviction took place, there had been no new absents, but only a continuance of the former absence. The Court of Queen's Bench rested their judgment on the ground that the contract subsisted, and that so long as it continued the workman was bound to return to his service. It is conceded that the contract so far remains, that the workman may be liable to an action for not fulfilling it; but the question is, whether a breach of a civil duty to return can be said to be a fresh absents within the meaning of this act of parliament. The words "absents himself" in that Act, mean a departure from actual service. The absents in respect of which the second conviction took place, was either no absents at all or a continuance of the previous absents. Suppose this workman had not been imprisoned, but had merely been brought before the justice for absents himself on the first occasion, could it be said that his refusal to return after demand was a fresh absents? If so, an offence might be created every day in the week, and the workman imprisoned during his life for these accumulated offences. If, however, the refusal to return after demand is a mere continuance of the first absents, how does the imprisonment for that offence render a subsequent refusal to return a fresh absents? Again, suppose there is a contract in writing to serve for twelve months, and the workman does not enter the service, could it be said that he might be required, day by day, to enter, and that if he refused he would on each occasion be guilty of a separate offence? The justice has the same power, whether there has been a contract in writing and a refusal to enter the service, or an entry upon the service and an absents therefrom. [*Bramwell*, B.—If the master brought an action

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against the workman for absenting himself, would he not recover one entire damage? So here the master requires the workman to be punished with reference to his breach of contract. When this application was made to the Court of Queen's Bench, my brother *Erle* was of opinion that the authority to the justice to put an end to the contract shewed that the relation of master and servant continued notwithstanding the imprisonment, but I am inclined to think that the statute only means that the justice may discharge the contract simpliciter, in lieu of either of the former punishments. *Pollock, C. B.*—A workman may be guilty of such an offence as to require punishment, by imprisonment and hard labour, or the case may be such as not to call for that punishment, and then in lieu thereof there may be an abatement of wages; or if the magistrate should think that, under the circumstance, there is no ground for punishment, but that the relation of master and servant does not exist on that footing which is desirable for social purposes, then he may put an end to it.] The magistrate is to act once for all, and as soon as he has adopted either of those courses his jurisdiction is at an end. The statute should receive a strict interpretation, since it imposes severe penalties on the servant, but gives him no equivalent advantage as against the master. By the 4th and 5th sections certain powers are given to justices to compel the payment of wages, but if the master refuses to employ the workman, the latter has no remedy under the Act, but must resort to a civil action.

Thirdly, the commitment is bad on the face of it. It is essential that there should be an entry on the service, in order to render the absenting an offence within the meaning of the statute; but the adjudication merely states that the complaint is true, it appearing that Baker having contracted to serve did misconduct himself by neglecting

and absenting himself from his master's service. [*Martin*, B.—The complaint states that he entered upon and worked under the agreement, and then the justice says "I do adjudge the said complaint to be true," and he goes on to state his reason for so adjudging, viz., it appearing that Baker having contracted to serve, absented himself.] 'The justice ought to adjudicate on all matters necessary to constitute the offence. The expression "absenting himself from his master's service" does not necessarily imply that he had entered upon it: *Ashew's Case* (a); *Smith's Master and Servant*, p. 317.—Again, in a conviction, it must appear that the justice acted solely on the evidence taken on oath in the prisoner's presence. On the face of this conviction it is clear that the justice acted also on other grounds, for the adjudication is, "it appearing to me as well upon the examination on oath," &c., "*as otherwise*." [*Martin*, B.—The prisoner may have confessed the offence.] In *Rex v. Luffe* (b) an order of bastardy, which was stated to have been made on the oath of the wife, "*as otherwise*," was held good, since it would be intended that the other evidence was on oath. That case however is distinguishable, for there it was not necessary that the evidence should be taken in the presence of the party charged; and moreover it is a well known principle that every intendment will be made in support of an order, but not of a conviction. *Regina v. Tordoff* (c) is an express authority, that a conviction is bad which does not shew that the evidence was given in the presence of the party charged.

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Huddleston, contra.—The principal question is whether the conviction puts an end to the contract. It is submitted that it does not. The object of the 4 Geo. 4, c. 34, was to

(a) 2 L. M. & P. 429.

(b) 8 East, 193.

(c) 5 Q. B. 933.

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afford protection to masters, but it would be of little avail unless they could compel their workmen to perform their contracts. Suppose a workman enters into a contract to serve for two or three years, on the faith of which his master enters into large engagements, and after a few weeks' service the price of labour rises, the servant might be willing to submit to a conviction in order to get rid of his contract. [*Bramoell, B.*—If a workman, after he had undergone his punishment, went to his master and tendered his services, would his master be bound to employ him?] He would: for the contract would still subsist. [*Pollock, C. B.*—No doubt, if the master had sued the servant in a Court of law, he would have put an end to the contract; and the question is whether this punishment ought not to have the same result.] The analogy does not hold: because in the case of an action the master would recover for the entire loss of service, whether for a month, a year, or longer, but in this case the imprisonment is limited to three months. The statute contemplates two classes of contracts, the one in writing, the other not. If the contract is in writing and the workman does not enter into the service, he is liable to be punished: that is only one offence and having failed to perform his contract, there is an end of it. But if he does enter into the service, whether the contract is in writing or not, the justice has jurisdiction during the continuance of the term. The power to commit *and* "abate a proportionable part of his wages," shews that the contract subsists notwithstanding the commitment. [*Pollock, C. B.*—The 6 Geo. 3, c. 25, provides, that if an apprentice shall absent himself from his master's service, he shall be compelled to serve for so long as he shall have absented himself, unless he shall make satisfaction to his master, *and so from time to time as often as he shall absent himself*; and in case he shall refuse to serve

or make satisfaction, a justice may commit him. The clause in that Act, with respect to workmen contains no such provision.] In the case of apprentices, a power is given to the magistrate to compel the apprentice to work beyond the term of his apprenticeship, or to make satisfaction: the punishment is for not making satisfaction. The clause does not say that the justice may commit "from time to time," but only that the apprentice shall make satisfaction "from time to time." If the language of the 3rd section of the 4 Geo. 4, c. 34, be looked at, it is obvious that the legislature contemplated a continuance of the contract notwithstanding the punishment. The first part of the section relates to the not entering into the service according to a contract in writing, but having entered the service, whether the contract is in writing or not, the justice may punish for any misconduct or misdemeanor in that service, by imprisonment *and abatement of wages*; that is, not the wages then due, but the wages which would accrue during the time of the imprisonment. If the punishment terminated the contract, it would have been unnecessary for the legislature to provide for an abatement of wages during the time of imprisonment. The enactment goes on to say, "or in lieu thereof," that is of the abatement of a proportionate part of the wages; the justice may abate the whole or any part of the wages, or discharge the workman from his contract. [*Pollock, C. B.*—The justice is to imprison *and abate* a proportionate part of the wages, "or in lieu thereof," that is, in lieu of the imprisonment and abatement. This conviction contains no adjudication as to abatement of wages.] The 20 Geo. 2, c. 19, empowers the justice to imprison *or abate* part of the wages, or discharge the contract; the 6 Geo. 3, c. 25, merely contains a power to imprison, and reading those Acts together with the 4 Geo. 4, c. 35, the meaning is that the justice may imprison, or inflict a pecu-

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niary penalty in the shape of abatement of wages (in both of which cases the contract subsists), or he may put an end to the contract. The fact of giving the justice power to discharge the contract shews that the legislature contemplated its continuance in the two other events. [*Martin*, B.—No doubt, in some cases it continues: if a workman is guilty of misconduct, as doing something wrong or spoiling his work, and he is punished for it, that would not affect the contract; but here the workman absented himself with a determination to put an end to the contract.] There is no difference in the consequences of the imprisonment whether it is for misconduct or absenting; the contract subsists, and when the workman has suffered the punishment, he is bound to return to his master's service, and the refusal to do so constitutes a fresh offence.

Then with respect to receiving the affidavits, the distinction is this: it may be shewn by affidavit that the justice had no jurisdiction to enter on the inquiry; but if he had jurisdiction, affidavits cannot be used to shew that he has arrived at a wrong conclusion: *Brittain v. Kinnaird* (a). [*Pollock*, C. B.—That was an action against a magistrate, and there was a conviction good on the face of it; but if that man had been brought before me by habeas corpus, I should have discharged him. There is a wide difference between protecting a magistrate against an action, who has acted honestly, and keeping a man in prison when he is there unlawfully.] If, in this case, the first conviction put an end to the contract, that might be shewn by affidavit; but if the contract subsists, affidavits cannot be used to shew that the justice put a wrong interpretation on the terms "misconduct or misdemeanor." [*Brammell*, B.—If we discharged this man, and he was again taken before a magistrate and committed for not returning to the service after request,

(a) 1 B. & B. 432.

would an action lie against the magistrate? *Martin, B.*—Suppose a magistrate convicted a person a second time for the same identical offence, would not that be without jurisdiction? This subject was fully considered in the case of *Regina v. Bolton (a)*, which laid down this rule: that where the justice has jurisdiction the Court will not receive affidavits impeaching his decision on the facts; and that the test of jurisdiction is whether or no the justice had power to enter upon the inquiry, not whether his conclusions in the course of it were true or false: but that it may be shewn by affidavits that he had no authority to commence an inquiry, inasmuch as the question brought before him was not one to which his jurisdiction extended; and this, although by mis-statement he has made the proceedings on the face of them regular. [*Martin, B.*—Suppose the magistrate determined that a person was a potter, when he was not a potter.] That fact might be shewn by affidavit, for it would disclose a want of jurisdiction. [*Watson, B.*, referred to *Thompson v. Ingham (b)*.] Here the matters existed which were necessary to give the justice jurisdiction: the person charged was a potter, there was a contract, and he had entered into the service. Then the justice having jurisdiction to inquire into the misconduct, adjudges that the party was guilty of misconduct in absenting himself after the termination of his punishment; and affidavits cannot be used to shew that he has come to a wrong conclusion.—On this point he also referred to *Regina v. Dayman (c)* and *Regina v. Brown (d)*.

Then as to the objections to the conviction: the complaint states that Baker contracted to serve, and having entered upon and worked under such agreement, he misconducted himself in his said service, by absenting himself from his said master's service. That means an actual

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(a) 1 Q. B. 66.

(c) Q. B. May 8, 1857.

(b) 14 Q. B. 710.

(d) Q. B. May 28, 1857.

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existing service. In *Ashew's Case* (a) it did not appear that the contract was in writing, or that the party had entered the service. The words "or otherwise," do not necessarily mean that there was other evidence not in the presence of the party charged: they may have reference to some expressions which fell from him.

Scotland, in reply.—Although the complaint is of such a nature as to give the justice jurisdiction to hear it, yet if it turns out in the course of the inquiry that he has no jurisdiction to convict that may be shewn by affidavit: *In re Bailey* (b). [*Bramwell*, B., referred to the note to *Crepps v. Durden*, 1 Smith's Lead. Cas. 589, 4th ed.] In *Paley on Convictions*, p. 377, 4th ed., the rule is thus stated: "Although the magistrate may have had power to enter upon the inquiry, it may be shewn by affidavit that there was no evidence of that which is required to form the basis of his jurisdiction, e. g. of a contract of service under the Master and Servants' Act, 4 Geo. 4, c. 34." The absenting is as much the basis of jurisdiction as the contract. [*Bramwell*, B. —In *Mould v. Williams* (c), a justice made an order under the Highway Act, 5 & 6 Wm. 4, c. 50, s. 73, for the removal of the plaintiff's timber, which was stated in the order to be laid upon a highway; and it was held that in an action of trespass against the magistrate, the plaintiff could not give evidence, in contradiction to the order, that the locus in quo was not a highway.] It is now more necessary to receive affidavits in cases of this kind, since no action will lie against the justice until after the conviction is quashed: 11 & 12 Vict. c. 44, s. 2.—Then as to the question of jurisdiction: this enactment, which authorizes imprisonment for a breach of contract, is contrary to the spirit of the law, and ought to receive a strict construction. The master is not bound to take back the workman after

(a) 2 L. M. & P. 429.

(b) 3 E. & B. 607.

(c) 5 Q. B. 469.

he comes out of prison; then how can there be a continuing absence from the service? The request to return cannot make any difference. The term "absenting himself," in this Act, means "finally leaving the service." The provision in the 6 Geo. 3, c. 25, as to apprentices, is decisive of this point. The recital of the 4th section of that Act speaks of one act of leaving by which the contract is not fulfilled; and the enacting part shews the intention of the legislature, that what may be done in the case of apprentices may not be done in the case of workmen. If the master brought an action against the servant for a breach of contract, he might recover the entire damages; so, here, the justice cannot convict from time to time, but once only.—As to the objections to the conviction itself, *Asker's Case* (a) and *Regina v. Tordoff* (b) are authorities in point.—The conviction is also bad on the ground that there is no adjudication as to abatement of wages. The justice ought strictly to comply with the requirements of the Act. [*Bramwell*, B.—Suppose a workman is committed on the Monday and comes out of prison on the Wednesday, is he to be paid the whole week's wages? If the magistrate adjudicated properly, he would adjudicate an abatement for the three days.]—He referred to *Rex v. Solomons* (c).

The Court intimated a wish to have the point as to the abatement of wages further argued.

Huddleston.—It does not appear on the face of the conviction under which statute the justice adjudicated; and the conviction may be supported under the 6 Geo. 3, c. 25, s. 4, which does not require any abatement of wages. [*Martin*, B.—The 4 Geo. 4, c. 34, has superadded something to the 6 Geo. 3, c. 25.; and it seems to me that as the one Act is auxiliary to the other the justice must act

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(a) 2 L. M. & P. 429.

(b) 5 Q. B. 933.

(c) 1 T. R. 249.

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upon it.] In *Rex v. Hoseason* (a) the Court considered that the punishments inflicted by the 20 Geo. 2, c. 19, and 6 Geo. 3, c. 25, could not be blended together. It is conceded, that if this were the case of a servant in husbandry, the adjudication must be under the 4 Geo. 4, c. 34, but being the case of a potter it may be made under either statute, and if not good under the latter it is under the former. Besides, the abatement of wages is not a necessary part of the adjudication; but is a matter in the discretion of the justice.

WATSON, B.—I am of opinion that the warrant is good. I have the misfortune to differ from the rest of the Court on one point. As to the general jurisdiction of this Court to receive affidavits for the purpose of invalidating a conviction, I think that wherever the objection is an entire want of jurisdiction in the magistrate, it is competent for the Court to ascertain, by affidavit, whether or no he had jurisdiction. For instance, if the person convicted was not a potter, or if a potter there was no contract between the parties, there would be no jurisdiction in the magistrate to adjudicate, and he could not, by finding those facts, confer on himself jurisdiction. Again, supposing the construction of the statute right, that the contract is dissolved by the adjudication, or that the power of the magistrate was exhausted by the conviction, these facts might be shewn by affidavit. *Thompson v. Ingham* (b) is an express authority on this point. There the County Court judge had *prima facie* jurisdiction to try the plaint; but it was taken away by a question raised as to title to land. The Court of Queen's Bench came to the conclusion that, although the County Court judge had decided that the title to land was not in question, that matter must be tried as a fact in a suit for prohibition.

(a) 14 East, 605.

(b) 14 Q. B. 710.

The 4 Geo. 4, c. 34, makes provision as to workmen misconducting or absenting themselves from service. That is not a new enactment. From the 20 Geo. 2, c. 19, a period of nearly 110 years, the legislature has passed Acts of this kind, which have been in constant operation ever since. I do not inquire into the policy of the legislature in passing these acts, but I take them as I find them, and give them the best interpretation I can. The 4 Geo. 4, c. 34, s. 3, speaks of persons in certain employments, one of which is a potter, and it provides for cases of contracts in writing and contracts not in writing. If there is a contract in writing, and the workman does not enter the service; or having entered the service absents himself, whether the contract is in writing or not, or is guilty of any other misconduct or misdemeanor in the execution thereof, the magistrate may commit him to the House of Correction, to be held to hard labour, for a period not exceeding three months, and abate a proportional part of his wages during the period he shall be so confined; or in lieu thereof, that is, in lieu of the imprisonment and abatement of wages, punish the offender by abating the whole or any part of his wages, or may discharge such servant in husbandry, artificer, &c., from his contract. Therefore, under the third head of punishment the magistrate may altogether discharge the contract: he may abate the whole or a part of the wages, but not rescind the contract: again, he may commit to prison, but not rescind the contract; and after the offender comes out of prison the contract still remains. It has been asked whether an action would lie against the magistrate: I think it would not, and for this reason, that he acts upon this as a continuing contract. The master, for the purpose of compelling the workman to perform his contract, obtains the adjudication of a magistrate that he shall be sent to prison: the master could not afterwards say "the absence of the workman is a discharge to me:" his

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going before the magistrate shews that there is a subsisting contract. The workman comes out of prison and will not return to the service; then in not returning, he is absenting himself from the service. Suppose a workman in a coal mine is guilty of misconduct; for instance, if he went with a Davy lamp uncovered where there was fire damp or choke damp, though he was committed to prison for that offence the contract would still remain. This is not a continuing absence. The offender has been punished for his absence up to the time of his commitment to prison, and when the imprisonment is ended the contract continues; therefore, if he afterwards absents himself, the matter may be again investigated by a magistrate.

The next question is, whether the conviction is good on the face of it. One objection was, that it is not stated in the adjudication that the offender entered the service. But the charge laid in the information is, that having entered the service he absented himself; on which the magistrate thus adjudicates—"Whereas the said William Baker being now brought before me the said justice in pursuance of my warrant issued against him in answer to the said complaint, and I having duly examined into the nature thereof, do adjudge the said complaint to be true," and then he adds, "it appearing to me as well upon the examination on oath of, &c., as otherwise, that the said William Baker, having contracted to serve as a potter, did misconduct himself in his said service, by absenting himself from his said master's service." All that is wholly immaterial: it would have been a perfectly good conviction if it had merely contained the statement that the complaint was true. But in the subsequent statement I find the words "did misconduct himself, &c., by absenting himself from his said master's service"—What service? The service alleged in the information. It was further objected, that the conviction says, "it appearing to me as well upon the examination

on oath of &c., as otherwise" &c. That however means that the information taken on oath fully established the fact: the word "otherwise" forms no part of the adjudication.

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Another objection was raised rather late in the discussion, viz., that there was no adjudication as to abatement of wages. On looking to the authorities, I find the same objection in other cases, for instance, in *Rex v. Tordoff* (a) and *Regina v. Richards* (b), but it was not relied on. In my judgment the 6 Geo. 3, c. 25, and 4 Geo. 4, c. 34, are both in force. The 6 Geo. 3, c. 25, after reciting that it frequently happens that artificers &c. leave their respective services before the terms of their contracts are fulfilled, enacts, "that if it shall appear to such justice that any such artificer &c., or other person, shall not have fulfilled such contract, or hath been guilty of any misdemeanor, it shall and may be lawful for such justice to commit every such person to the House of Correction for the county &c., for any time not exceeding three months, nor less than one month." The next Act is the 4 Geo. 4, c. 34, which, after reciting the 20 Geo. 2, c. 19, 6 Geo. 3, c. 25, and 4 Geo. 4, c. 29, and that it is expedient to extend the powers of the said Acts, amongst other provisions enacts, that "it shall and may be lawful for such justice to commit every such person to the House of Correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a proportionable part of his or her wages, for and during such period as he or she shall be so confined in the House of Correction." The 6 Geo. 3, c. 25, empowers the justice to imprison *simpliciter*, without hard labour. Then comes the 4 Geo. 4, c. 34, which enables the justice to imprison with hard labour, and to abate a part of the wages. Is then this conviction good, which does not award an abatement of wages? I think it is perfectly good. I read the enactment thus—it shall be lawful

(a) 5 Q. B. 933.

(b) 13 L. J. Mag. Cas. 147.

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to commit, lawful to add hard labour, and also lawful, as a further punishment, to award an abatement of wages. If the preamble of this Act be looked at the intention of the legislature is plain, viz., to extend the powers of the previous Acts; and therefore in addition to the power to imprison, given by the 6 Geo. 3, c. 25, there is a power to add hard labour, and also in addition by *way of punishment*, a power to abate part of the wages. The latter, in my opinion, is not compulsory on the magistrate, and the conviction is perfectly good without its being included. I so interpret the statute: it does not say that the imprisonment is to operate as an abatement or suspension of the wages, indeed if it did that would not render the conviction bad, for then the amount would be a mere matter of calculation, viz., one-fourth or one-twelfth of the yearly wages, according to circumstances. The magistrate is not to assess the amount of wages to be abated, but the statute says it shall be lawful for him to abate a *proportionable part* of the wages &c. Moreover, if the conviction took place at the end of the period of service, there could be no abatement of wages. It is enough that there is an Act in force which supports the conviction. If the 6 Geo. 3, c. 25, stands unrepealed, a conviction under it is good, notwithstanding the subsequent Act, and it is not necessary to shew on the face of the conviction under which Act it took place. If under the 6 Geo. 3, c. 25, it could not be under the 4 Geo. 4, c. 34, and vice versa: it is sufficient to say "contrary to the form of the statute." Then is the 6 Geo. 3, c. 25, repealed by the 4 Geo. 4, c. 34? The law on this subject is thus stated in Dwaris on Statutes, p. 532, 2d ed. "But a later statute which is general and affirmative, does not abrogate a former which is particular: thus, the stat. 5 Eliz. 4, that none use a trade without being apprentice, did not take away 4 & 5 Ph. & M. 5, that *no weaver* use &c. Sir O. Bridgman lays down this doctrine:—that the

law will not allow the exposition of a statute to revoke or alter by construction of general words any particular statute where the words may have their proper operation without it. Affirmative words do not take away a prior exemption. It is a general rule that subsequent statutes which add accumulative penalties and institute new methods of proceeding, do not repeal former penalties and methods of proceeding ordained by preceding statutes, without negative words." That being so, there is nothing in the 4 Geo. 4, c. 34, to repeal the 6 Geo. 3, c. 25, and therefore if this is not a good conviction under one Act it may be under the other. I am sorry to say that on this part of the case I differ from the rest of the Court, but relying on the view I have taken of the statute 4 Geo. 4, c. 34, I think the commitment good, and I also think that the 6 Geo. 3, c. 25, being unrepealed, may be resorted to in order to support this conviction.

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BRAMWELL, B.—I think that the prisoner ought to be discharged. Upon the question whether we can look at the affidavits in order to ascertain whether the magistrate had jurisdiction, I own the inclination of my opinion is, that we are not at liberty to look at them. Perhaps, what I am now saying may be extra-judicial, because it is not the point on which the prisoner is to be discharged, but I wish to state shortly the grounds on which I think the affidavits ought not to be received. I am inclined to adopt the rule laid down by the learned editors of *Smith's Leading Cases*, vol. 1, p. 591, 4th ed. "Possibly the distinction may be between cases in which the conviction or order is made by persons who are admitted to constitute a legal Court, and who have stated facts which, on information being laid or a case coming before them, would be matter to be proved and adjudicated upon by them, and cases in which the

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objection is that they are not a Court at all, because in fact magistrates, or because interested, because out of the limit of their jurisdiction, or for some reason striking at their existence as a Court, so the objection is not that the statement of a Court is erroneous but that the source of the statement is not a Court. I do not otherwise see why a person might not come within the jurisdiction of the magistrate either by an action against him, or in any other way; for the principle on which we examine the propriety of these convictions must be the same whether personal liberty or property is concerned; and the inconvenience of revoking the addition of magistrates in matters of this kind is so great that I think the rule which I have referred to ought to be adopted. But, assuming that we have power to extend into the jurisdiction, as it is called, or into the existing jurisdiction necessary to give jurisdiction, it ought not to be more extensive than this, viz., we may enquire into the facts of everything except the subject matter of complaint. Therefore, all that we are at liberty to inquire into is whether the person convicting was a magistrate, whether a complaint was made, whether the prisoner was a prisoner, and whether there had been an entry into the service. If those facts existing, it was for the magistrate to adjudicate on the complaint. On these grounds I think that we ought not to look at the affidavits.

But assuming that we can, I am of opinion that a magistrate may convict a second time for a second absence because the imprisonment is not a dissolution of the contract; it may give the master a right to dissolve the contract, but if he does not, the service continues, and there may be a second absencing from the service. It has been argued that there was only one absencing,—that it began on a particular day, and continued when the prisoner was taken

the second time before the magistrate. To my mind that is not so. I think that the first absenting began and ended when he was first convicted, and that there was a second absenting by his not returning when his imprisonment was over, or, at all events, when the master intimated to him a desire to continue the service. Therefore it seems to me in the first place that we ought not to look at the affidavits, and if we do, that this man was properly convicted.

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The next objection is, that it does not appear on the face of the conviction that the prisoner entered the service. I am extremely reluctant minutely to criticise documents when there is very little doubt what the actual facts are; here, however, it does appear that he entered the service, because the complaint is that having entered the service he absented himself, upon which the magistrate says "I find that he did absent himself, from his said service." Now, the word "service" may mean popularly "a service," or absolute service. If there had been nothing to shew the time the actual service commenced, I should agree with the argument of Mr. *Scotland*, which is supported by the decision of my brother *Wightman* in *Ashew's Case* (a). If it does not appear that he entered the service, the saying that he "absented himself" would mean nothing more than that he did not enter the service which he agreed to enter.

Another objection was, that the words "as otherwise" shew that the magistrate proceeded on some reasons which might be insufficient. I think that is not so. He acted on the evidence, and there might be some other legitimate ground upon which he could act.

I think the objection that the magistrate ought to have adjudicated upon the abatement of wages is sustainable. It may be that a workman served for three weeks, and at the end of the month his wages were payable:

(a) 2 L. M. & P. 429.

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then if he absented himself for two or three is committed to prison without any adjudication to abatement of wages, is he to lose a whole wages? At common law his wages would be due unless he served the entire month. If the legislature meant the enactment for his benefit, the magistrate ought to have adjudicated that, "a certain wages would be payable for a month's ending on &c., I adjudicate an abatement of one part of such wages:" the result would be that he would get the other portion. On that ground I think the conviction is bad under the 4 Geo. 4, c. 34. The *Huddleston* says that it is a good conviction under 6 Geo. 3. On that point I differ from my brother *son*. I should not like to say that the 6 Geo. 3 has been repealed, because I am not sure that there may be some important clauses in respect of which no provision has been made in the subsequent statute; but when a statute directs something to be done in a certain event, and another is made which appoints something else to be done in the same event, the first is contradictory, but more comprehensive and including the second, I cannot help thinking that the first Act is repealed. It seems to me that the 6 Geo. 3, is no longer in force in regard to this particular matter, and that the conviction, being bad under the 4 Geo. 4, c. 34, is bad for not containing adjudication as to abatement of wages.

MARTIN, B.—I am also of opinion that this conviction is bad. It seems to me defective in omitting to provide a matter upon which the 4 Geo. 4, c. 34, requires that justice shall adjudicate. The 3rd section enacts, that "if any person shall and may be lawful for such justice to commit every such person to the House of Correction, there to remain and be held to hard labour for a reasonable time, not exceeding six months."

ceeding three months, *and* to abate a proportional part of his or her wages for and during such period as he or she shall be confined in the House of Correction," &c. There is one sentence in which the legislature enacts that certain things shall be done, and it is sufficient to invalidate this conviction that the justice has not done what the Act requires. If we can see a reason for the provision, that affords strong ground for arriving at the conclusion that the justice should do what he is directed. I think that there is good reason for the provision, and that it is most important to both parties. When a workman is brought before a justice and committed, is he to lose the whole of his wages or only so much as is proportionate to the period he was not occupied in labour but was in prison? It seems to me that the object of the legislature was to provide for that, and to indicate that for that period, and that period alone, is the workman to be deprived of his wages by the act of the justice. In my opinion it is an essential part of the adjudication, that this matter shall be adjudicated upon, and that not having been done, the conviction is bad. I must observe that the document itself is very informal. It recites that the prisoner did "unlawfully misdemean and misconduct himself in his said service by *neglecting* and *absenting* himself from his said master's service, without the leave of his said master." What is the meaning of the word "neglecting"? I have no idea: there is nothing to connect with it. The same word is used in the adjudication, and it is quite insensible. However, I found my judgment upon the want of that which the statute expressly requires to be in the adjudication, and which is necessary and important for the reason given by my brother *Bramwell*. Then it is said that this is a good conviction under the 6 Geo. 3, c. 25. I concur, as a general rule, with what my brother *Watson* has read from *Dwarris* on Statutes, but

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all these matters must be looked at with common sense. Here there is a subsequent act of parliament in words, but with a provision superadded, and when two Acts on the subject, both affirmative, with some superadded to one, we must look to both and see if the object of the legislature can be effectually carried out. On this reason we must read the 4 Geo. 4, c. 34, in connection with the 6 Geo. 3, c. 25, to which that provision is added. Again, the 6 Geo. 3, c. 25, contains an express provision that the party aggrieved by any determination of a justice shall have an appeal; in the 4 Geo. 4, c. 34, there is no such provision. It is a matter of course that a person should know under what act of parliament he is convicted, and if the justice meant to convict under the 6 Geo. 3, c. 25, he should say so, in order that the party may have an opportunity of appealing. If the justice does not, the conviction is bad, for the party is deprived of a right which he has under the one Act, but not under the other. I cannot think it a proper mode of carrying law into effect, to shift back from one act of parliament to another, and say that if the conviction is not good under this Act, it is under that.

On the question as to receiving affidavits, I have had the greatest doubt; and cannot arrive at a satisfactory conclusion. The first part of the 3rd section of the 4 Geo. 4, c. 34, enacts "That if any servant in husbandry or any artificer, calligrapher, printer," &c. (mentioning a variety of persons), "shall contract with any person to serve him for any time, &c., and shall not enter into or commence his service according to his contract (such contract being in writing and signed by the contracting parties)," &c. Now, it is conceded that under that part of the section there can be only one offence and that if the party is brought before a justice and convicted of not *entering* the service, there is an end of it.

Then, in the event of a second conviction for the same offence, what redress has he? If the argument of Mr. *Huddleston* is correct, the consequence will be that the party has no appeal and no redress of any sort, and he may be convicted over and over again, contrary to law. Again, suppose a justice convicts a person who is not within the class of persons with respect to whom the enactment is made, is the finding of the justice to be conclusive, and the person subject to punishment although he is not one of the class mentioned in the Act? What is the objection to that conviction? I can see no other than this—that the justice had no jurisdiction. Can he find, as a fact, that a person who is not a calico printer is a calico printer, and thereupon imprison him for three months with hard labour, and deprive him of all possible redress? It seems to me a question of the greatest difficulty, and I am not able to give an answer satisfactory to my mind.

Then as to the other point—the statute creates a variety of offences, viz., the not entering the service, the having entered it and absenting himself from it, the neglecting to fulfil or being guilty of any other misconduct or misdemeanor in the execution thereof. My impression is that each offence must be looked at by itself in order to ascertain its true nature. If the party absent himself upon a claim of right, intending to leave altogether, that is one offence; on the other hand if he merely absents himself for a day or two, for the purpose of pleasure, that is a case of quite a different character. If he absents himself on a claim of right, alleging that he is not bound to serve by reason of a difference between him and his master as to the amount of his wages, no civil action for damages would lie for the entire loss of service, and in the event of a second action, it would be

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a good plea that damages had been recovered in action: *Dunn v. Murray* (a). On this point, he decline giving a positive opinion, as the matter is in great doubt, but on the whole I think that the ought to be discharged.

POLLOCK, C. B.—I concur with the major Court that the applicant is entitled to his discharge with my brothers *Martin* and *Bramwell* adjudication is bad. The magistrate was bound merely to commit but also to abate a proportion of the wages; and the adjudication not being in accordance with the Act, and the magistrate not having fulfilled his duty in that respect, the conviction cannot be sustained. The adjudication is extremely important, and in being a matter of doubt, should settle the litigation between the parties which the magistrate ought to have decided then and there. It is said that the conviction was supported by the 6 Geo. 3, c. 25, but I think that cannot stand, and even if it were a conviction under that Act, I cannot entertain not the slightest doubt that a conviction under that statute would be bad. I not only concur with two of my brothers that the prisoner should be discharged on the ground of a defective commitment, but I found my judgment on the broad and more general ground. The 6 Geo. 3, c. 25, contains an enactment respecting to apprentices, and says "that if any apprentice shall absent himself from his master's service, his term of his apprenticeship shall be expired, and the apprentice shall, at any time or times thereafter, be found, be compelled to serve his said master so long a time as he shall have so absented himself."

(a) 9 B. & C. 780.

such service, unless he shall make satisfaction to his master for the loss he shall have sustained by his absence from his service; *and so from time to time* as often as any such apprentice shall, without leave of his master, absent himself from his service before the term of his contract shall be fulfilled: And in case any such apprentice shall refuse to serve as hereby required, or to make such satisfaction to his master, such master may complain upon oath to any justice of the peace," &c. From that I infer that where the legislature meant that the power to enforce the contract should continue, they have said so. The 4th section, which is relied on as supporting a conviction without an adjudication as to abatement of wages, does not contain any such provision, but merely a power to commit. Therefore I infer that under that section the justice has no power to interfere a second time; indeed the 3rd section seems to me conclusive, for where a power to commit from time to time was intended, it is so expressed. It may be asked, if there is this power with respect to apprentices, what objection is there to it in the case of workmen? I answer, very considerable. The manner in which the criminal law of this country is administered shews a different mode of dealing with persons in their minority and persons of full age. I can well understand why an apprentice may be corrected and compelled to return to his service; and that may occur from time to time with great propriety which would not be proper in the case of a man of full age and surrounded, perhaps, with a wife and children. I cannot think that the legislature intended that a master should have the power of adopting towards his workmen this mode of punishment, from time to time, perhaps for as many weeks as there are days in the year. But it is said that the 4 Geo. 4, c. 34, contains some expressions which apparently import that the contract is not to be at an end;

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but it is only *apparently*, for we must consider what is the meaning of the act of parliament, and though there are arguments in support of one view, there are arguments as strong the other way, and we are bound to give effect to that which seems to have the better reason. It has been said that because there is a third mode of dealing with the subject, viz., to discharge the contract, in the other cases the contract is not put an end to. I cannot follow that mode of reasoning. It appears that the third mode of dealing with the subject was given for this reason, that without it the justice could not put an end to the contract *simpliciter*. The justice may interfere and imprison and abate the wages, or he may interfere by abating the whole or any part of the wages, or he may discharge the contract. It does not at all follow that the interference by sentencing a man to imprisonment does not put an end to the contract. It is not necessary to give an opinion whether it does in all cases; in some it certainly does, for instance if a workman absolutely renounced the service, and then the master took him before a magistrate who punished him by three months' imprisonment, that would put an end to the service. In a case of that kind, he could not go on punishing the man for not entering the service. The legislature has limited the punishment to three months' imprisonment with hard labour, and if the justice could go on punishing, the man might spend the whole year, except a few days, in gaol. For these reasons I have come to the conclusion, satisfactory to my mind, that the legislature by the 3rd section of the 4 Geo. 4, c. 34, did not intend that a workman should be imprisoned more than once for not fulfilling his contract. It appears to me contrary to the spirit of the English law that a man should be punished over and over again for substantially the same matter, and which, for civil purposes, would admit of but one action being brought.

The legislature never intended that the three months' imprisonment should be exceeded with reference to the same subject-matter of contract. If the argument of Mr. *Huddleston* is well founded, this man might spend fifteen months all but a week in prison with hard labour, and comparing that with the general scale of punishment for crimes at sessions and on circuit, I cannot think that the legislature ever intended it. I not only concur in the formal objection to the warrant, but I have thought it right to express my opinion on a grave and important question with reference to the manufacturing interests and the rights of labour.

I also concur in this, that it is our duty, by affidavits, to inquire whether the magistrate had jurisdiction; and I think that there is a difference between those considerations under which a magistrate would be protected against an action for improper conduct, if he meant honestly, and cases where the law protects the liberty of the subject. The prisoner will therefore be discharged.

Prisoner discharged.

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HORTON v. BOTT and Another.

May 28.

QUAIN had obtained a rule calling on the plaintiff to shew cause why an order of *Coleridge, J.*, should not be rescinded, whereby it was ordered that the defendant should answer interrogatories, to be delivered to him by the plaintiff, pursuant to the 51st section of the Common Law Procedure Act 1854.—The affidavits in support of the order stated that the action was ejectment to recover possession of certain messuages, lands, and hereditaments, situate at Nantwich in the county of Chester, and that the defendant defended as landlord: that the plaintiff's great great uncle,

A plaintiff in ejectment, who claims as heir at law, has no right, under the 51st section of the Common Law Procedure Act, 1854, to interrogate the person in possession of the land as to what his title is.

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Isaac Horton, was at the time of his decease in April 1803, seised of the said messuages, lands, and hereditaments: that he died intestate leaving Mary Horton, his only child, him surviving: that the said Mary Horton, on the 14th October 1805, intermarried with one Michael Bott, and there was issue of such marriage two children only, that is to say, Issac Horton Bott, who died in November 1806, and John Bott, who died in June 1811: that Mary Bott died in April 1822, without leaving any issue her surviving: that in consequence thereof the plaintiff became her heir at law and entitled to her real estate: that Michael Bott, her husband, remained in possession of the said estate until his decease in December 1846: that in October 1847, the estate was advertised for sale by the trustees of Michael Bott, when the plaintiff applied to their attorney to know their title and was informed that it was under a settlement made on the marriage of Michael Bott and Mary Horton. The plaintiff afterwards requested to see the settlement, but was refused.—The order of *Coleridge J.* stated that the interrogatories were to correspond with those in the case of *Flitcroft v. Fletcher (a)*.

Prentice shewed cause, in last Easter Term (May 7th).—The case of *Flitcroft v. Fletcher (a)* is an authority for allowing these interrogatories. There it was held that the 51st section of the Common Law Procedure Act 1854 applies to actions of ejectment, and also that under that section a defendant in ejectment is entitled to interrogate the plaintiff as to the character in which he sues, and the nature of the pedigree on which he relies. The only difference between that case and the present is, that there the defendant sought to interrogate the plaintiff, but that makes no difference in principle. [*Martin, B.*—Is there

(a) 11 Exch. 543.

any case in equity where an ejectment having been brought by a heir at law against a party in possession, the Court has compelled the defendant to disclose his title?] The rule laid down in *The Attorney General v. The Corporation of London* (a) is, that a plaintiff is entitled to know what the defendant's case is and how he makes it out, but not to see the proofs by which that case is to be established. [Channell, B.—*The Attorney General v. The Corporation of London* proceeded on peculiar grounds. The defendants were conservators of the river Thames, and they alleged that they were owners of the bed and soil of the river, and the question was whether certain acts of ownership done by them were referable to their claim of title, or to their power and authority as conservators. So that the Crown was clearly entitled to some discovery, the question being as to its extent.] The judgment proceeded on the broad ground, that a plaintiff in equity is always entitled to a discovery of the case on which the defendant relies. The interrogatories ought to be administered, and if they are improper, the defendant may object to answer them.

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Quain, in support of the rule.—The Court are asked to lay down this doctrine, that a person out of possession may bring ejectment and compel the person in possession to give assistance in ejecting himself. *Flitcroft v. Fletcher* (b) does not go to that extent, for there the discovery was sought by the defendant. That decision however was disapproved of by the Court of Queen's Bench in the case of *Edwards v. Wakefield* (c). There Lord Campbell, in delivering the judgment of the Court, said, "We were much pressed with the recent case of *Flitcroft v. Fletcher* in the Exchequer. If the Court there meant to decide that the defendant may always ask the plaintiff to declare on

(a) 2 Mac. & G. 247.

(b) 11 Exch. 543.

(c) 6 E. & B. 462.

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oath how he means to shape his case, we are not prepared to assent to it, and we should not feel ourselves bound, by a decision of this nature, to the same extent as where a decision can be reviewed on error, even if the case were precisely in point." *Flitcroft v. Fletcher* may perhaps be supported on the ground adverted to by *Alderson, B.*, viz., that "the Court has a general power to require a person who seeks to disturb the possession of another to say by what right he does so." Here the plaintiff, who is out of possession, is seeking to compel the party in possession to disclose his title. In *Bellwood v. Wetherell* (a) Lord Abinger, C. B., said, "Where a party is in possession of an estate, and a perfect stranger comes to turn him out, alleging himself to be the person entitled, it is but reasonable that the party so attached should have an opportunity of knowing the plaintiff's case, so far as whether he claims as heir at law—whether he claims under a devise—or whether he alleges any imperfection in the defendant's title deeds. There the defendant is taken by surprise, and therefore I can easily understand in such a case why, not the evidence, but the nature of the title should be disclosed." To allow these interrogatories would be to supersede the established rule of law, that a plaintiff in ejectment must recover on the strength of his own title; and it would also be contrary to the rule which prevails in Courts of equity: *Wigram On Discovery*, p. 285, 2nd ed.

Cur. adv. vult.

The judgment of the Court was delivered by

BRAMWELL, B.—This is a rule to set aside an order of my brother *Coleridge* requiring the defendant to answer interrogatories.

The facts deposed to in the affidavits were, that the

(a) 1 Y. & C. 211, 218.

plaintiff was the heir at law of a person who died in the early part of this century seized in fee of land, which went to his heir, and ultimately to a lady who married and died after having had some children, when her husband took possession and occupied until his death last year: that after his death the plaintiff brought this action of ejectment, and applied to the professional gentleman, who acted on behalf of the parties now in possession, to know what their title was, and was told that it was under a settlement executed by the lady before mentioned, and the interrogatories ordered to be answered were relative to this alleged deed of settlement and the title of the defendants under it. It was insisted on behalf of the defendants that there was no power to order such interrogatories. The authority is given by the 51st section of the Common Law Procedure Act, 1854, which enacts that interrogatories may be required to be answered upon any matter as to which discovery may be sought. Of course this must mean according to the rules existing in Courts of equity. And the question was whether the discovery sought was within those rules.

We may be permitted to say that (perhaps owing to our want of familiarity with the subject) the remark of Lord Abinger in *Bellwood v. Wetherell* (a) seems well founded—"Upon looking at the cases some of them appear extremely embarrassed and contradictory, and no steady principle is adopted in them." In Wigram on Discovery the rule is thus stated: "*The right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case.*" Of course this would not include the discovery sought by the plaintiff; but in page 285 of the same book the author

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(a) 1 Y. & C. 215.

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says: "Lord *Redesdale*, however, in speaking of the for which discovery is given says, the plaintiff may 'a discovery of the case on which the defendant relies of the manner in which he intends to support it' (the first of these propositions—that a plaintiff is entitled to discovery of the case on which the defendant relies—that the plaintiff is entitled to *know what the case is* of no doubt. The common rules of pleading require it necessary that the defendant should so state his case that the plaintiff may know with certainty what case he meet; and on the trial, by observance of these rules the plaintiff is secure against surprise. It is at the peril of the defendant if his pleadings are defective in this respect but this is quite independent of the law of discovery." The general rule therefore as to discovery seems unquestionable by this doctrine of Lord *Redesdale's*, sanctioned by Lord *Wigram*. But there are other authorities. In *Belloc v. Wetherell* (a) Lord *Abinger* says, "Now the obvious line to be drawn is this—that though in general the defendant has no right to the discovery of the plaintiff's title, yet in certain cases he will be entitled to a discovery of the nature thereof not of the evidence of that title. Thus, where a party files a bill as rector, the defendant may file a cross bill to discover whether the plaintiff in the original suit is entitled to the tithes that which he admits may be due to somebody. The defendant may allege that some other person is entitled, and in such case he may file his bill of interpleader. If he do not go that length, he may suggest that he has had notice that some other person is entitled paramount to the plaintiff or that the plaintiff has parted with his right to the tithes and in such case, though there is no ground whatever to

(a) Referring to *Redesdale*. Pleading, 3 P. Wms. 369, &c.
ing, 9.

(b) Referring to *Sidney v. Sidney*.

(c) 1 Y. & C. 206.

make the party disclose the evidence of his title, still there is ground to call on the party to discover the nature of his title, so that the defendant shall not be harassed a second time. That would apply to several cases: as for instance, if the defendant to an original suit had established a *modus*, and it then turned out that the plaintiff had parted with his interest, a person claiming by a paramount title might say that he was not bound by the decision. It is clear that in such case the defendant would have a claim to discovery of the nature of the plaintiff's title, in order to protect himself in that particular payment." So, in *Metcalf v. Hervey* (a), Lord Hardwicke says, "The question comes to this, whether any person in possession of an estate, as tenant or otherwise, may not bring a bill to discover the title of a person bringing an ejectment against him, to have it set out and see whether that title be not in some other. I am of opinion he may, to enable him to make a defence in ejectment, even considering him as a wrong doer against every body." In *Glegg v. Legh* (b) discovery of even the title was refused. In *Lovndes v. Davies* (c) that and more were granted to a person in possession, defendant in a suit in equity and a writ of right, who had filed a cross bill; this case however is denied by Sir J. Wigram in his book on Discovery, p. 290. *Flitcroft v. Fletcher* (d) was also a case where a person in possession sought discovery of the title or case of the plaintiff suing him. *Selby v. Selby* (e) was determined on a point of pleading. *The Attorney General v. The Corporation of London* (f) was also decided on the particular relation between the plaintiff and defendants.

In the result we find no case in which a plaintiff, as in

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(a) 1 Ves. Sen. 249.

(b) 4 Mad. 193.

(c) 6 Sim. 468.

(d) 11 Exch. 543.

(e) 4 Bro. C. C. 11.

(f) 12 Beav. 8.

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the present case, making a claim, thereby gives him a right to call on a person in possession to state by whom he is so. On the contrary, the grounds of decision in the cases cited are inconsistent with such a right.

The case of an heir at law claiming against a person deriving title by conveyance from one of the common ancestors must have been of constant and continuance year after year; and the circumstance of its existing in which such a discovery as that now made was obtained is, to our minds, strong to shew that it is not a right to it. If such a right existed, it would be an infinite number of instances, have been of the same importance to heirs at law to have availed themselves of it. It is impossible not to see that such a right to it might have some most pernicious consequences. It cannot be established at all it had better be in a court more familiar with these questions. As at present administered I think it does not exist, and consequently make it absolute.

Rule at



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In the Matter of an Appeal against a Conviction of the
Justices of the Borough of Maidenhead.

RICARDO, Appellant, and THE MAIDENHEAD LOCAL BOARD
OF HEALTH, Respondent.

May 22.

THIS was a rule calling on the justices of the General Quarter Sessions of the peace for the county of Berks, and Albert Ricardo, to shew cause why a writ of prohibition should not issue to prohibit the said justices from proceeding in the above appeal, or to enforce any order made thereon.

It appeared from the affidavits in support of the application, that in December, 1851, by an order of her Majesty in council, "The Public Health Act, 1848," (11 & 12 Vict. c. 63,) was put in force within the borough of Maidenhead. In June, 1854, the Local Board of Health for the borough made a general district rate, and assessed Mr. Ricardo at the sum of 2*l.* 5*s.* in respect of a house and land occupied by him, which rate he paid. Subsequently the Local Board made three other general district rates, when Mr. Ricardo

The 103rd section of "The Public Health Act, 1848," provides, that if any person assessed to a rate under that Act fail to pay the same when due, a justice may summon the defaulter to shew cause why the rate should not be paid: and if no sufficient cause be shewn, the justice may cause the same to be levied by distress. By section 135, any person who shall think himself aggrieved by any such rate, or by any order, conviction,

judgment or determination of or by any matter or thing done by any justice in any case in which the penalty imposed or the sum adjudged shall exceed 20*s.*, may appeal to the Court of Quarter Sessions held next after the making of the rate. The Act having been put in force within the borough of M., the Local Board made three several district rates, and assessed R. in sums amounting to 4*l.* 5*s.* 6*d.* in respect of premises occupied by him. R. refused to pay the rates on the ground that the greater portion of the premises occupied was not within the borough. He was thereupon summoned before two justices who made an order, whereby, after reciting the refusal to pay the rates, that the parties appeared before them, and having heard the matter of complaint, they adjudged that R. pay the several rates with costs, and that if the several sums be not forthwith paid, that the same be levied by distress. R. appealed against this order to the Court of Quarter Sessions, who quashed the order with costs to be paid by the Local Board, who thereupon appealed to this Court for a prohibition, on the ground that the appeal to the Sessions would not lie.—*Held*, that as the matter was not free from doubt, the Court ought not to grant a prohibition.

Scilicet: That the "sum adjudged" in the 135th section means the sum in respect of which the adjudication was made; and, therefore, that the order of the justices was a matter or thing done by them in which the sum adjudged exceeded 20*s.* within the meaning of that section.

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refused to pay the sums assessed on him, amounting to 4*l.* 5*s.* 6*d.*, on the ground that the greater portion of the premises occupied by him was not within the borough. He was summoned before two justices, who after hearing evidence on both sides made the following order:—

Borough of Maidenhead, } Be it remembered that
 in the County of Berks, } the 31st day of October 1855,
 to wit. } complaint was made before

of her Majesty's justices of the peace in and for the said borough, that Albert Ricardo, of the parish of Cookham in the said borough, had refused to pay three general district rates made by the Local Board of Health for the borough or district of Maidenhead, in the borough of Maidenhead aforesaid, one rate made on the 28th day of August, 1855, amounting to 2*l.* 5*s.*, another made on the 20th day of February, 1855, amounting to 1*l.* 7*s.*, and another made on the 17th day of August, 1855, amounting to 13*s.*, making together the sum of 4*l.* 5*s.* 6*d.*: and now, on the 1st day, to wit, on the 1st day of December in the year 1855, at Maidenhead in the said borough, the parties appeared before us her Majesty's justices of the peace for the said borough; and now having heard the matter in relation to the said complaint: We do adjudge the said Albert Ricardo to pay the said several rates before mentioned, forthwith, and also to pay to Ephraim Davy, the collector of rates for the said Local Board of Health, the sum of 18*s.* 6*d.* in costs in this behalf. And if the said several sums shall not be paid forthwith: We hereby order that the same shall be paid by distress and sale of the goods and chattels of Albert Ricardo, unless the said several sums shall be paid.

Given under our hands and seals this 1st day of December, A.D. 1855, &c.

HENRY F. DAVY
 JOHN HIGGS.

Mr. Ricardo appealed to the General Quarter Sessions, who quashed the order of the justices, and ordered that the Local Board of Health pay to Mr. Ricardo 61*l*. 11*s*. 6*d*. for his costs of the appeal. Whereupon the present rule was obtained, against which

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Sir *F. Thesiger* and *Carrington* now shewed cause.—The application is made on two grounds: first, that no appeal against the order of the justices will lie, the appellant not having appealed against the rates: secondly, that this is not an order or determination of the justices in a case in which the *sum adjudged* exceeds twenty shillings, within the 135th section (a) of "The Public Health Act, 1848." First, the rates having been made in respect of property in

(a) Section 135.—"That any person who shall think himself aggrieved by any rate made under the provisions of this Act, or by any order, conviction, judgment, or determination of or by any matter or thing done by any justice or justices, in any case in which the penalty imposed or the sum adjudged shall exceed the sum of 20*s*., may appeal to the Court of General or Quarter Sessions holden next after the making of the rate objected to, or accrual of the cause of complaint; but the appellant shall not be heard in support of the appeal, unless within fourteen days after the making and publication of the rate appealed against, or accrual of the cause of complaint, he give to the Local Board of Health or justice or justices by whose act he may think himself aggrieved notice in writing stating his intention to bring such appeal, together with a statement

in writing of the grounds of appeal; and the said Court, upon hearing and finally determining the matter of the appeal, shall and may, according to its discretion, award such costs to the party appealing or appealed against as they shall think proper, and its determination in or concerning the premises shall be conclusive and binding on all persons to all intents and purposes whatsoever: Provided always, that if there be not time to give such notice and enter into such recognizance as aforesaid before the sessions holden as last aforesaid, then such appeal may be made to, and such notice, statement, and recognizance be given and entered into for, the next sessions at which the appeal can be heard: Provided also, that on the hearing of the appeal no grounds of appeal shall be gone into or entertained other than those set forth in such statement as aforesaid."

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the occupation of the appellant, the greater part of which is not within the borough, and consequently out of the jurisdiction of the Local Board of Health, the rates are altogether void, and it was not necessary that he should appeal against them. *The Governor of the Poor of Bristol v. Wait* (a) decided, that if a party be assessed to the poor rate for premises which he occupies and other distinct premises which he does not occupy, and his goods are distrained for the several rates jointly, he is not confined to the remedy by appeal, but may bring an action. The Lord Denman, C. J., in delivering the judgment of the Court, said: "A rate has been imposed on the plaintiff in respect of land which they did not occupy; a rate which the overseers had no power to make nor the magistrates to enforce. It is like a rate on land situate in a different parish, which, according to *Holt*, C. J., in *Groenvelt v. Burwell* (b), is 'an illegal tax which the justices have no power to confirm.' The opinion of this Court to the same effect was expressed by Lord Tenterden in *Weaver v. Price* (c)." The case of *The Churchwardens, &c., of Ingham v. Shaw* (d), is relied on by the other side: it was held that a person exempt from poor rate, as the owner of premises belonging to a scientific or literary society, must, if assessed for such premises, contest the liability by appeal, and cannot bring an action for a levy or to enforce such rate, not appealed against. That case, however, is distinguishable from the present, for the parties imposing the rate acted within their jurisdiction and consequently their decision, although erroneous, is conclusive, unless appealed against: here there is a want of jurisdiction, and the party assessed is not bound to appeal, because the rate is void.—Secondly, this

(a) 1 A. & E. 264.

(b) 1 Ld. Raym. 471.

(c) 3 B. & Adol. 4

(d) 10 Q. B. 868.

within the 135th section of "The Public Health Act, 1848." The document appealed against is not a warrant of distress, the form of which is given in Schedule (D.) of that Act, but an order or determination of the justices. It contains an express adjudication that the appellant is liable to the rate. Then, by the 135th section, "any person who shall think himself aggrieved by any rate made, &c., or by any order, conviction, judgment, or determination of, or by any matter or thing done by any justice," &c., may appeal. The language of that section is sufficiently comprehensive to include this case; which is, at all events, a "matter or thing done by a justice."

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Kinglake, Serjt., *Griffiths* and *Lawrence*, in support of the rule.—No appeal will lie against this document. It is conceded that where there is total want of jurisdiction; the party grieved is not bound to appeal, though he may do so if he thinks fit: *The Churchwardens, &c., of Birmingham v. Shaw* (a). Here property is rated, the principal portion of which is not within the borough. The 103rd section provides, that if any person assessed to any such rate fail to pay the same when due, and for the space of fourteen days after demand in writing, a justice may summon him to shew cause why the rate should not be paid, and in case he fail to appear, or no sufficient cause be shewn, the justice may cause the same to be levied by distress. By section 104, the warrant of distress may be in the form contained in Schedule (D.). The 136th section has special reference to two subjects: it provides, first, that any person who shall think himself aggrieved by any rate may appeal within a certain limited time, viz., to the Court of General or Quarter Sessions holden next after the making of the rate. Here, the party not having availed himself of his

(a) 10 Q. B. 868, 880.

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right of appeal is in the same predicament as if he never had it. In case of a distress being levied, he might replevy or bring an action, but he has no power under that section to appeal. To allow him to do so would be in effect to give an appeal against the rate after the time limited by the statute has expired. The second branch of the 135th section has reference to the 129th section, which relates to damages, costs, or expences to be recovered in a summary way, and which provides, that "if the *sums adjudged* be not paid by the party against whom the adjudication is made, the same may be levied by distress." Then the 135th section gives an appeal against the determination of the justices where the sum adjudged exceeds twenty shilling [*Bramwell*, B.—According to that argument, if there was no dispute about the sum, but only about the liability, and the justice decided, however erroneously, that there was no liability, there could be no appeal.] The statute contemplates an *adjudication* as to a sum of money: on application for a warrant of distress, all that the justice does is to direct it to issue. This document is an informal warrant of distress: there is a finding that a sum is due, and a direction that it shall be levied by distress. The justices had no power to adjudicate, but only to inquire whether that which was ordered to be paid, was paid. [*Pollock*, C. B.—Suppose the justices decided that the party had paid the rate, when he had paid it; could he not appeal? The appeal is the creature of the statute, and can only exist where it can clearly be collected from the language of the statute that it was the intention of the legislature to give the appeal: *Regina v. The Justices of Warwickshire* (a). *Rex v. The Justices of Staffordshire* (b). There are cases in which this statute gives no appeal, as for acts done under the 39th section, or where justices have allowed the

(a) 6 E. & B. 837.

(b) 12 East, 572

or the sum adjudged does not exceed twenty shillings.—
They also referred to the 17 Geo. 2, c. 38, s. 7.

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MARTIN, B. (a)—We are all of opinion that the rule ought to be discharged. This is an application for a prohibition, and if we acceded to it the matter would be at an end, and any proceedings which the appellant might choose to take on the judgment of the Court of Quarter Sessions would be absolutely stopped. Under those circumstances, unless the matter is perfectly clear, we ought not to prevent the appellant from trying the question, if he thinks fit. In Com. Dig. tit. "Prohibition" (D.) the rule is laid down that "generally after an appeal a prohibition shall not be allowed if the matter be not apparent; for by that the party affirms the jurisdiction." It is impossible to say that this matter is perfectly clear. The question turns on the 103rd and 135th sections of 11 & 12 Vict. c. 63. The 103rd section provides, that if any person assessed to any rate shall fail to pay the same when due, and for the space of fourteen days after the same shall have been demanded in writing, a justice may summon the defaulter to appear before him "to shew cause why the rate in arrear should not be paid and in case the defaulter fail to appear according to the exigency of the summons, or no sufficient cause for nonpayment be shewn, the justice may by warrant under his hand and seal cause the same to be levied by distress." I am by no means satisfied that the Court of Quarter Sessions was right (no appeal against the rate having been instituted) in allowing as an objection to the order that the property was not within the borough. That however, is no ground for prohibition, but of objection before them. Then the 135th section enacts, "that any person who shall think himself aggrieved by any rate made under the provisions

(a) *Pollock*, C. B., had left the Court.

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of this Act, or by any order, conviction, judgment, determination of or by *any matter or thing done by a justice* or justices, in any case in which the penalty is or the sum adjudged shall exceed the sum of twenty shillings, may appeal to the Court of General or Sessions" &c. There can be no doubt that this is a matter or thing done by a justice. But then it is said, that it is not a matter or thing in which the *sum adjudged* exceeds twenty shillings. If we put that construction on the statute, the consequence would be that the Local Board of Health never could appeal. But there is nothing in the Act to prevent their having an appeal in the case of the justices deciding wrong. I think that the phrase "sum adjudged" means the sum in respect of which the decision of adjudication is made. My impression is that this construction lies: it is not however, necessary to give a conclusive judgment on that point, because, as I have already said, the matter ought to be perfectly clear before we can give judgment by prohibition. If the view taken by the Local Board of Health is correct, any attempt to enforce this payment of costs would be without jurisdiction, and an action of trespass might be maintained, which is a more direct and less expensive mode of determining the question than by a prohibition.

BRAMWELL, B.—I am of the same opinion, and for much the same reasons. It seems to me almost impossible to read the 135th section without seeing that this phrase "sum adjudged" is within it.—"Any person who shall think himself aggrieved by any rate, &c. or by any order, conviction, judgment, or determination of, or by any matter or thing done by any justice" &c. Now stopping at this there are no words of art to which we must give a technical meaning, but plain, ordinary, and popular.

guage; and anybody but a lawyer would be astonished on being told that this was not an order or determination of, or a matter or thing done by a justice,—I say anybody but a lawyer, because a lawyer, reasoning on general principles not intelligible to uninstructed persons until explained to them, might put a different interpretation on the words. My brother *Kinglake* says that those words are qualified by the words, “in any case in which the penalty imposed or the sum adjudged shall exceed the sum of twenty shillings;” but if the “sum adjudged” be read as the “sum adjudicated to be paid,” there could be no appeal by the party against whom judgment was given that nothing should be paid. It seems to me therefore that the latter words do not qualify the former, and that the word “adjudged” means “adjudicated upon.” I doubt whether the legislature intended that there should be, first of all, a power of appealing against the rate, and then a power of appealing against the enforcement of that rate—it may or may not have been. We have no right to speculate on the intention of the legislature, and if there is a doubt we should do wrong in issuing a prohibition, because according to the statement of those who apply for it they are not without remedy, inasmuch as if any proceedings are taken to enforce the payment of these costs, they may contest their validity by an action, in which there may be an appeal to the highest tribunal in the country.

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WATSON, B.—I am of the same opinion. There is one clear answer to this rule, viz., that the matter has been heard and determined by the Court of Quarter Sessions and the only thing remaining to be done is, to enforce payment of the costs. According to the authority cited by my brother *Martin*, after an appeal the matter must be clear to induce the Court to grant a prohibition. It is

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true we might compel the applicant to declare in prohibition; but I think that, before we interfere, we ought to be well certified that the Court of Quarter Sessions had no jurisdiction; and I must confess that the argument we have heard satisfies me that the matter is not without considerable doubt. I am inclined to think that the Court of Quarter Sessions had jurisdiction. First, a rate is to be made, then it is to be enforced—a summons is to issue, cause is to be shewn and the justices are to adjudicate. They do so, and determine that a warrant of distress shall issue, and upon that a warrant of distress does issue. This document is in terms an adjudication, but I do not rely on that. The 135th section says “that any person who shall think himself aggrieved by any rate made”—that is, either the person on whom the rate is made, or other parties in the district, and whether the rate was above twenty shillings or below twenty shillings,—“or by any order, conviction, judgment, or determination of or by any matter or thing done by any justice or justices, in any case in which the penalty imposed, or the sum adjudged, shall exceed the sum of twenty shillings”: therefore in that case the appeal is restricted to an adjudication in respect of a sum exceeding twenty shillings. It has been argued that the 135th section has reference to the 129th. No doubt the 129th section is included in the 135th, but the latter is general and applies to all cases of adjudication under this act of parliament. It is clear that is so, for the 137th section says “that no rate, nor any proceeding to be had touching the conviction of any offender against this Act, nor any order, award, or other matter or thing whatsoever made, done, or transacted in or relating to the execution of this Act, shall be vacated, quashed, or set aside for want of form” &c. That clause which refers to the 135th, shews what its meaning is, that is to say, any proceeding by a justice under the authority

of that Act. Here the making the order and issuing the warrant on no sufficient cause being shewn is such a proceeding, and that may be appealed against. Whether the Court of Quarter Sessions was right or wrong in not holding that the rate was conclusive is for them to determine, and not a question of jurisdiction. For these reasons, I am of opinion that the rule should be discharged.

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POLLOCK, C. B.—I was not in Court during the latter part of the argument, but I concur with my learned brothers that the rule ought to be discharged. Several questions have been discussed, and a doubt may be entertained whether the rate can be considered a nullity or not; and whether, the time for appealing against the rate having gone by, there was any power to appeal to the Sessions; it is sufficient for us to say, that there being a doubt we ought not to interfere by prohibition.

Rule discharged.

CHAPMAN v. THE MONMOUTHSHIRE RAILWAY AND
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June 6.

THE declaration stated, that before and at the time of giving the notice and taking the inquisition hereinafter mentioned, and after the passing of the Lands Clauses Consolidation Act, 1845, and of the Railway Clauses Consolidation Act, 1845, and of the Monmouthshire Railway and Canal Act, 1852, the plaintiff was possessed of and entitled to a certain house situate in the borough of Newport and county of Monmouth, used and occupied by the plaintiff as a public house, and numbered 4 in Canal Parade in the said borough, for the residue of a term of sixty years from the 30th day of June, A.D. 1811, subject

In an action on a verdict and judgment obtained in an inquisition before a sheriff's jury, under the 68th section of the Lands Clauses Consolidation Act, 1845, the inquisition is not conclusive evidence that the plaintiff is entitled to compensation.

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to a yearly rent under and by virtue of an indenture of lease, dated the 29th day of June, A.D. 1811, whereby, &c. And that by the execution of the works and the construction of the railway by the said last mentioned act of parliament authorized to be executed and constructed by the defendants, and in the exercise of the powers by the aforesaid Acts conferred upon the defendants for the purposes of the said railway, the said house and the plaintiff's said interest therein were damaged and injuriously affected within the meaning of the said acts of parliament, and in the manner described in the notice hereinafter mentioned; and the plaintiff was and is entitled to compensation, under the provisions of the said acts of parliament, in respect of the same having been so damaged and injuriously affected, and the defendants have not at any time made satisfaction for such damage and injuriously affecting under the provisions of the aforesaid acts of parliament, or at all; and the plaintiff by reason of the premises sustained a loss, and claimed to be entitled to compensation from the defendant to an amount exceeding the sum of 50*l*.; and thereupon the plaintiff being so entitled to and claiming such compensation as aforesaid, and being desirous of having the question of such compensation settled by a jury, did give a notice in writing under his hand to the defendants, in accordance with the provisions of the aforesaid acts of parliament, and did therein and thereby state to the defendants the said nature of his interest in the said house in respect of which he claimed compensation; and that the said house and the plaintiff's interest therein had been damaged and injuriously affected in the exercise of the said powers and by the construction of the said railway, and the execution of the said works of the defendants, in this, that the defendants had wrongfully obstructed and narrowed a certain common and public footway, called Canal

Parade, on and to which the said house abutted and adjoined, leading from Union Row to Idanarth Street, in Newport aforesaid, the free use of which footway was necessary to the convenient occupation of the said house, by constructing on such footway a fence and other works for the purposes of the said railway, and maintaining the same thereon for a long space of time, whereby the defendants prevented the convenient occupation by the plaintiff of the said house, and obstructed and hindered the access of passengers and customers thereto, and prevented the plaintiff from carrying on his business therein in as beneficial a manner as he otherwise would have done, and deprived him of the profits of his trade and business carried on therein: And in this, that the defendants also wrongfully obstructed and narrowed a certain other common and public highway, leading from Canal Parade aforesaid to a street called Corn Street in Newport aforesaid, by the construction of their railway and the execution of their works, and kept the same so obstructed and narrowed, which said highway communicated with Canal Parade aforesaid, and was used by the customers and persons passing and repassing to and from the said public house, whereby the defendants had obstructed and hindered the access of such passengers and customers to the said house of the plaintiff, and had prevented the plaintiff from carrying on his trade or business therein in as beneficial a manner as he otherwise would have done, and had deprived him of the profits of his trade and business carried on therein: And in this, that the defendants had wrongfully erected and constructed certain fences and executed other works for the purposes of their said railway, and wrongfully maintained and continued the same near to certain ancient windows in the said house through which the light and air ought to have entered, and until the execution of the said works by the defend-

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ants did enter into the said house for the more convenient occupation of the same, whereby the defendants obstructed the said ancient windows and prevented the light and air from entering through the same, and rendered the said house dark and unwholesome and unfit for habitation: And in this, that the defendants had wrongfully erected rails and executed other works and had maintained the same for the purposes of their said railway and for the purpose of working and using, and the defendants had worked and used thereon and by means thereof, locomotive engines, carriages and waggons, and had caused the same to be drawn and propelled thereon, and otherwise maintained and used their said railway, and exercised their said powers close to and opposite the said house whilst the plaintiff was possessed thereof, and resided therein with his family, and carried on therein his trade and business of a publican; and in and by so doing the defendants had disturbed and shaken the foundations of the said house, and had cracked and injured the walls and ceilings thereof, and had caused vibrations, by which the defendants had damaged the said house and the goods and chattels of the plaintiff therein, and had caused divers loud noises, whereby the plaintiff and his family were disturbed in their quiet enjoyment and occupation of the said house, and had caused smoke, vapours, dust and filth to enter and fill the said house, and by reason of the premises had rendered the said house unsafe, unwholesome and unfit for occupation and for the said trade and business of the plaintiff. And in and by the said notice the plaintiff further stated to the defendants that he claimed compensation from them in respect of his said house and his said interest therein having been damaged and injuriously affected as aforesaid; and that the amount of his claim for compensation by reason of the premises was 156*l*. And the plaintiff in and by the said

notice did also state to the defendants that it was the desire of the plaintiff to have the amount of the said compensation settled by a jury, according to the provisions of the statutes in that case made and provided; and that unless the defendants were willing to pay the said sum of 156*l.* to the plaintiff, and entered into a written agreement for that purpose within twenty-one days after the receipt by the defendants of the said notice, the plaintiff required the defendants within twenty-one days after such receipt to issue their warrant to the sheriff of Monmouthshire or other proper officer to summon a jury for settling the amount of the said compensation. And the plaintiff further says, that the defendants were not willing to pay the said amount of compensation claimed by the plaintiff, nor would they enter into a written agreement for that purpose within twenty-one days after the receipt of the said notice; but wholly refused so to do or to make any compensation whatsoever to the plaintiff in respect of the premises. And the plaintiff and defendants did not agree as to the amount of such compensation. And the defendants being desirous that the question of the said disputed compensation should be tried before a special jury, within twenty-one days after the receipt of the said notice by them, duly issued their warrant in writing under their common seal and directed to the sheriff of the county of Monmouth (he not being interested in the matter in dispute), in accordance with the provisions of the said acts of parliament; and by the said warrant, after reciting and setting out the notice aforesaid, and that the defendants were unwilling to pay the compensation claimed thereby and disputed the same, the defendants, as promoters of the undertaking, pursuant to the provisions of the first mentioned act of parliament in that behalf, required the said sheriff to summon a special jury, pursuant to the directions

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contained in the said Act, for the purpose of settling and determining the said question of disputed compensation.—
Averments: that afterwards an inquisition was duly held and taken in accordance with the provisions of the said acts of parliament in that behalf, and in pursuance of the last mentioned request and warrant of the defendants, before E. B. Dimmack, Esq., then being sheriff of the said county of Monmouth and before a jury (naming them), who were duly impannelled and sworn to enquire of and concerning the matters by the said warrant directed to be enquired of, assessed and determined by them as in the said warrant mentioned; and the plaintiff and defendants having by their respective counsel, attorneys or agents appeared before the said sheriff and the said jurors, and having produced evidence touching the matter in question as aforesaid; the said jurors upon their oath said that they did assess and give a verdict for the sum of 40*l.* to be paid by the defendants to the plaintiff, as and by way of compensation for obstructing and hindering the access of foot passengers, customers, horses and carts along, over and upon the common and public highway mentioned in the said warrant and in the said notice, leading from Canal Parade to Corn Street in Newport aforesaid. And the said jurors upon their oath aforesaid, also said that they did assess and give their verdict for a sum of 20*l.* 10*s.* to be paid by the defendants to the plaintiff, by way of compensation for the obstruction of the light and air, and of the convenient access to the said house, caused by the construction of a fence (in the said notice and warrant mentioned) on the said public footway called Canal Parade on and to which the said house abutted and adjoined as aforesaid; and for constructing and maintaining the said fence for the space of thirteen calendar months. And the said jurors upon their oath aforesaid, also said that they did

assess and give a verdict for the sum of 45*l*. to be paid by the defendants to the plaintiff, for the depreciation in the annual value of the said house and premises, by reason of the loss of trade and business carried on therein by the plaintiff as a beer-house keeper (as in the said notice and warrant mentioned); and by the obstruction, since the 31st day of January, 1856, of the access of air and light (as in the said notice and warrant mentioned) to the said house and premises; and by the smoke, vapour and noises (in the said notice and warrant mentioned) caused by the works and the locomotive engines, carriages and waggons of the defendants constructed, maintained and worked, drawn and propelled close to and opposite the said house and premises, which said several sums of 40*l*., 20*l*. 10*s*. and 45*l*. were so assessed by the verdict of the said jurors, as the compensation for the damage sustained by the plaintiff, by reason of the damaging and injuriously affecting the said house and the plaintiff's said interest therein as hereinbefore alleged, and amounting in the whole to 105*l*. 10*s*. And the said sheriff did then and there accordingly, pursuant to the statutes in that behalf, give judgment for the said total sum of 105*l*. 10*s*., so assessed by the said jury, to be paid by the defendants to the plaintiff, according to the provisions of the said statutes; and the said verdict and judgment were then and there duly signed by the said sheriff, and being so signed were duly deposited and left by the said sheriff with the clerk of the peace of the said county of Monmouth, by whom the same are now kept among the records of the Quarter Session of the said county, and the said verdict and judgment still remain in full force and effect and nowise reversed or satisfied: Yet the defendants have not paid to the plaintiff the said sum of 105*l*. 10*s*. or any part thereof.

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Plea.—That neither by the execution of the works, nor by the construction of the railway in the declaration mentioned, nor in the exercise of the powers of the Acts in the declaration mentioned, conferred on the defendants for the purposes of the said railway, was the said house or the plaintiff's interest therein damaged or injuriously affected within the meaning of the said acts of parliament, or in the manner described in the notice in the declaration mentioned; nor was, nor is the plaintiff entitled to compensation, under the provisions of the said acts of parliament, in respect of the same having been so damaged or injuriously affected.—Issue thereon.

At the trial before *Willes, J.*, at the last Monmouthshire Spring Assizes, the plaintiff proved a certified copy of the inquisition before the sheriff, and there rested his case. The defendants objected that the inquisition was not conclusive as to the right of compensation, and tendered evidence as to the claims on which the sheriff's jury had made their assessments. Such evidence was rejected by the learned judge, who being of opinion that some of the claims for which the assessment of 45*l.* had been made were in respect of the use of the railway and therefore of doubtful validity, directed a verdict for the plaintiff for the sums awarded separately; and gave leave to the defendants to move the Court and to appeal in the place of a bill of exceptions.

Whateley, accordingly, obtained a rule nisi for a new trial on the ground that the learned judge misdirected the jury in holding:—

First.—That there was evidence to go to the jury.

Secondly.—That the inquisition was conclusive on the plaintiff's right to compensation in respect to the matters alleged in it to be the subject of compensation.

Thirdly.—That the inquisition was conclusive as to there

being a highway, and that the learned judge rejected evidence that it was not a highway.

Fourthly.—That the learned judge rejected evidence that the fence was not on the defendants' land, or on land upon which they had authority to place it.

Fifthly.—That some of the matters in respect of which the sum of 45*l.* was assessed by the sheriff's jury are not the subjects of compensation; and that that sum not being severed in the inquisition, no part of it can be recovered.

The *Solicitor General*, *Phipson* and *Matthews* shewed cause (June 5). The question depends on the 68th section of 8 & 9 Vict. c. 18, which enacts, that "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction" under the provisions of their Acts, and if the compensation claimed shall exceed 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit. In *Regina v. London and North Western Railway Company* (a), the majority of the Court limited the functions of the jury under this section to the fact of damage and its amount. Admitting for the present the authority of that decision, the result of the cases on this subject is, that it is a condition precedent to the jurisdiction of the sheriff's jury that the claimant has a good title, and that the injuries are such as may be properly inquired of by the jury: that the Company by issuing their warrant make no admission of title, and the claimant, upon obtaining his verdict, is compelled to bring an action thereon and distinctly allege his

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(a) 3 E. & B. 443.

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title. It is submitted that on these pleadings all the objections to the plaintiff's title to damages, and to the jurisdiction of the jury, appear on the record, and might be taken advantage of in the proper way. The language of the learned judge as to the conclusiveness of the inquisition applied only to the points as to which it could be conclusive, that is, the fact of damage and its amount. As to the other parts of the case the inquisition was some evidence. On the first claim, that in which the defendants had narrowed the highway by erecting upon it a fence, and so obstructed access to the plaintiff's house, the evidence tendered by the defendants was that the fence was not erected upon their own land, but such evidence was immaterial and was therefore properly rejected. Again, as to the question of *public* highway, the jury had a right to consider and decide that point as against the defendants. The authority of *Regina v. London and North Western Railway Company* (a) only extends to questions of private way and of private title. [Pollock, C. B.—If the jury cannot try the question of a private right of way, a multo fortiori, they cannot decide upon the existence of a public right of way?] With regard to the damage caused by the use of the engines, that claim comes either under the 68th section of the Lands Clauses Consolidation Act or under the 16th section of the Railways Clauses Consolidation Act (b), which enacts, that the Company may do certain specified acts, and may do "all other acts necessary for making, maintaining, altering or repairing, and using the railway." This item of damage comes within the term "using the railway." [Bramwell, B.—Is a permanent amount of compensation to be fixed, or is the damage to be assessed de anno in annum? Pollock, C. B.—The intention of the Acts was, that the compensa-

(a) 3 E. & B. 443.

(b) 8 & 9 Vict. c. 20.

tion should be once for all.]—(*Regina v. The Lancaster and Preston Railway Company* (a) and *Regina v. The Eastern Counties Railway Company* (b) were referred to.)

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Whateley, Gray and Sir *T. Phillips* appeared in support of the rule; but were not called upon to argue.

Cur. adv. vult.

POLLOCK, C. B. now said.—We have consulted with my brother *Willes*, who states that he intended to decide contrary to the case of *Regina v. The London and North Western Railway Company* (c): we are bound to decide in accordance with that case; the rule will therefore be absolute with liberty for the plaintiff to appeal.

Rule absolute accordingly (d).

(a) 6 Q. B. 759.
(b) 2 Q. B. 347.

(c) 3 E. & B. 443.
(d) Reported by Douglas Brown, Esq.

KNILL and Another v. HOOPER.

June 10.

THE first count of the declaration was on a policy of insurance in the usual printed form (a), and stated “that the plaintiffs did cause themselves and every of them to be insured, lost or not lost, at and from Terceira to a final port of discharge in the United Kingdom, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, &c., and other furniture of and in the good ship or vessel called the “Europa,” whereof was master, &c., beginning the adventure upon the said goods and

In a voyage policy of insurance on salvage, there is an implied condition or warranty of seaworthiness.

(a) See Arnould on Insurance, vol. 1, p. 21.

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merchandizes from the loading thereof aboard the said ship as above mentioned, upon the said ship, &c., and so should continue and endure during her abode there; upon the said ship, &c., and further until the said ship with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever should be arrived at, as above mentioned; upon the said ship, &c., until she had moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same were there discharged and safely landed: and that it should be lawful for the said ship, &c., in the voyage to proceed and sail to and stay at any ports or places whatsoever, and without prejudice to the said insurance; and that the said ship, &c., goods and merchandizes, &c., for so much as concerned the assured, by agreement between the assured and the assurers in the said policy, were and should be valued at 2000*l.* being on salvage valued at 8000*l.* against total loss only. The vessel having been abandoned by her original crew and taken into Terceira by the salvors, in whose interest the said assurance was effected." (Then followed the usual provisions as to perils of the seas, &c.)—The declaration then stated that the plaintiff made the policy as the agent and for the use and benefit of Joas de Freitas, and after the usual allegations of the payment of the premium by the plaintiff and the subscription of the policy by the defendant, proceeded to state that before the insurance was effected, the said ship, with divers goods of value on board the same, had been and was abandoned at sea by her original crew, and had been and was saved at sea from loss by the perils of the seas by the said Joas de Freitas, who thereby became and was entitled to salvage for the same ship and goods, amounting to a large sum of money, and which salvage has never been paid or satisfied; and that the said Joas de Freitas was then and

from thence continually afterwards, until and at the time of the loss hereafter mentioned, interested in the said ship and goods in the said policy of insurance and memoranda mentioned which had been so saved as aforesaid, in respect of the salvage thereof to a large value and amount, to wit, to the value and amount of all the monies by him or the plaintiffs ever insured or caused to be insured thereon.—The declaration then stated, that the ship, with the goods on board thereof, set sail from Terceira on her voyage towards Queenstown, and before her arrival was, by the perils of the seas, totally lost, &c.—There was a second count on a similar policy.

Plea.—That the said ship or vessel was not, at the time she departed and set sail on the voyage mentioned in the said policy, seaworthy for the voyage thereby insured.

Demurrer and joinder therein.

Bovill (*J. Brown* with him) argued in support of the demurrer (June 3).—On this policy of insurance there is no implied warranty of seaworthiness. The subject-matter of the insurance is salvage, and the salvors have no power to repair the ship, nor can they recover for repairs: their only remedy is *in rem*. It is not disputed, as a general proposition, that an implied warranty of seaworthiness attaches to a contract of insurance. In *Christie v. Secretan* (a), *Lawrence, J.*, said, “The consideration of an insurance is paid in order that the owner of a ship, which is capable of performing her voyage, may be indemnified against certain contingencies; and it supposes the possibility of the underwriter gaining the premium: but if the ship be incapable of performing her voyage, there is no possibility of the underwriter’s gaining the premium; and if the consideration fails, the obligation fails.” [*Watson, B.*—Suppose the

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masts had been cut away, and it was necessary for the ship to go to a particular place in order to get new rigging, would not the salvors have authority to do such repairs as were necessary to take her there?] The case of *The Rainger* (a) decided that salvors cannot recover charges for repairs. The subject-matter of the insurance being salvage, the underwriter must have known that the vessel was in an unseaworthy condition, and consequently there could be no implied warranty of seaworthiness. The case falls within the principle of the decision in *Weir v. Aberdeen* (b), where a vessel having sailed and put back to the *Downs*, and then sailed again and laboured and strained much from being overloaded, and then put back a second time; and upon an application to the underwriters for liberty for the ship to go into port to discharge part of the cargo, it was communicated to them that the ship was too deep in the water; and it was held that as the subsequent loss had not in any degree arisen from her having so strained and laboured, the underwriters were liable: Lord *Ellenborough*, C. J., there said, "With respect to the sufficiency of the communication made to them, it is quite clear that the underwriters were told all that was in substance necessary for them to know; for they were told that when the vessel sailed she had too large a cargo on board, and that she was not in a situation fit to perform her voyage." [*Bramwell*, B., referred to *Thompson v. Hopper* (c).] That case only decided that there is not in general an implied warranty of seaworthiness in a *time policy*.

Blackburn, contra.—This is an insurance "at and from," and not a *time policy*, as in *Thompson v. Hopper*. *Weir v. Aberdeen* is no authority that upon a *policy* of this kind

(a) 2 Haggard's Adm. Rep. 42.

(b) 2 B. & Ald. 320.

(c) 6 E. & B. 172.

there is no implied warranty of seaworthiness. In *Gibson v. Small (a)*, *Parke, B.*, said, "There is ample authority that a warranty or condition of seaworthiness at the commencement of the risk is implied in all voyage policies." Whether the salvors can or cannot charge the owner with the expence of repairing the ship, they are bound to do all that is necessary to enable her to prosecute the voyage with safety. "Seaworthiness" is a relative term, and whether a vessel is seaworthy depends on the particular state of circumstances. Here the term has reference to the subject-matter of insurance, and it is implied that the vessel shall be reasonably fit to come to England. There is nothing in the language of the policy to exclude the implied warranty of seaworthiness. The statement that the ship had been abandoned by her crew, is not equivalent to a statement that she was not to be repaired; neither does it appear that *Terceira* was a place where the vessel could not be repaired. The defendant must shew something amounting to a contract to dispense with the warranty of seaworthiness which the common law implies.

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Bovill, in reply.—The doctrine of implied warranty of seaworthiness depends on this principle, that the insured is presumed to be better acquainted with the state and condition of his ship than any other person, and that he has tacitly undertaken that she is in a condition to perform the destined voyage: *Park on Insurance*, p. 459, 8th ed. That principle cannot apply to an insurance on salvage. In such case, what amount of seaworthiness is required, and to what extent are the salvors bound to repair? [*Pollock, C. B.*—"Seaworthiness" is a term which varies with every possible state of circumstances. A vessel may be seaworthy in a harbour but not seaworthy out of it; or it may be

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seaworthy out of the harbour but not fit to sail to Ramagate or Boulogne; or it may be fit for that purpose but not fit for a voyage to the East Indies; or it may be seaworthy for a voyage in summer but not in winter. No vessel ought to sail on any voyage unless there is a reasonable expectation that it will terminate safely.] Here the underwriter knew that the vessel was not fit for the voyage, for the policy states that she was abandoned by the crew. The very subject-matter of the insurance excludes any warranty of seaworthiness.

Cur. adv. vult.

The judgment of the Court was now delivered by

WATSON, B.—This was an action on two policies of insurance, on a voyage from Terceira to a final port of discharge in the United Kingdom, on the ship “Europa” and her cargo, described as “being upon salvage valued at 8000*l.* against total loss only. The vessel having been abandoned by her original crew and taken into Terceira by the salvors in whose interest the said assurance was effected.” To this the defendant pleaded that the said ship or vessel was not, at the time she departed and set sail on the voyage, seaworthy for the voyage thereby insured. To this plea there was a demurrer which was argued before us a few days ago. On the part of the plaintiff it was argued that there was no warranty of seaworthiness to be implied on the part of the assured in these policies; but we think that the plea is good and the defendant entitled to our judgment.

It is now well established as a rule of law that on an insurance for a voyage, either on ship or goods or freight, a warranty of seaworthiness for the voyage of the ship insured, or of the ship in which the goods are carried, is to

be implied. Indeed it may be said that a warranty of seaworthiness in voyage policies is the basis of the contract. Thus, Lord *Wensleydale* (then *Parke, B.*), in the case of *Small v. Gibson* (a), lays down the law thus:—"In the common law of England, to be collected from these sources," viz., judicial decisions, dicta, and text writers on the common law, "there is ample authority that a warranty or condition of seaworthiness at the commencement of the risk is implied in all voyage policies, whether it has been adopted originally from the law merchant or implied from the very nature of the contract itself." And Lord *Campbell*, in delivering his opinion in the same, says (b),—"With regard to voyage policies, we have usage and authority establishing the implied conditions as certainly as any point of insurance law."

This being the rule, does the present case afford an exception thereto? No doubt the parties to a policy of insurance may, if they please, stipulate that there is to be no warranty of seaworthiness; but certainly they have not done so in express terms in these policies, and we do not construe the words used as implying that the usual warranty should be dispensed with. The insurance professes to be on "salvage," which no doubt means on the ship and cargo in respect of the lien the plaintiffs had thereon in respect of salvage service rendered. The words "the vessel being abandoned by her original crew and taken into Terceira by the salvors" do not appear to us to indicate that there is not to be any warranty of seaworthiness, but are descriptive and introductory to the words following "in whose interest the said insurance is effected."

It was asked, what amount of seaworthiness is required, and to what extent are the assured to go in repairs? Our answer is, that the term "seaworthiness" is a relative term:

(a) 4 H. L. Cas. 397.

(b) 4 H. L. Cas. 419.

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there is no positive condition of the vessel recognized by the law to satisfy the warranty of seaworthiness. Lord *Campbell* well observes in *Small v. Gibson* (a),—"With regard to its (seaworthy) literal or primary meaning, I assume it to be now used and understood that the ship is in a condition in all respects to render it reasonably safe where it happens to be at the time referred to, in a dock, in a harbour, in a river, or traversing the ocean." Seaworthy or not is always a question for the jury, and in all cases the question for the jury will be whether the ship was, at the commencement of the voyage, in such a state as to be reasonably capable of performing it. (See observations of *Erle, J.*, in *Thompson v. Hopper*, 6 Q. B. 181.) It was said that the underwriter ought in such a case as the present to rely on the description of the ship, in the slip, for ascertaining the state of the vessel and the amount of the risk; we do not think there is any thing in this argument, for the same observation would apply to all insurances.

We are therefore of opinion that the plea is good and that the defendant is entitled to our judgment.

Judgment for the defendant.

(a) 4 H. L. Cas. 418.

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LEE v. EVEREST.

June 10.

DECLARATION for work and labour by the plaintiff as an architect, surveyor, and estate valuer.—Plea: Never indebted.

The particulars of the plaintiff's claim, indorsed on the writ, were as follows:—

- | | |
|----------------------------------------------------------------------------------------------------------------------|---|
| 1853. Jan. 1st. Making survey, valuation and report on Mr. White's house, on the County Court, and on the Gas Works. | } |
| 3 & 4. Making survey, valuation and report on the Grand Stand; afterwards making calculations for giving evidence. | |
| 3. Attending at the Petty Sessions to give evidence on the first named appeals. | |
| 8. Attending at Newington Court House to give evidence on the appeal of the tenant of the Grand Stand. | |

Expenses .

Total . . £49 : 16 : 0

A survey and valuation of the parish of E. had been made for the purpose of a poor rate: against which certain inhabitants appealed. The defendant who was an attorney and clerk to the parish officers, thinking it advisable that the valuation should be supported by the evidence of another surveyor, with the authority of the parish officers wrote to the valuer to secure the services of a competent person for that purpose. The valuer communicated with the plaintiff, an architect and surveyor, who, to qualify himself for giving evidence, examined the premises in respect of which the litigation arose, and afterwards gave evidence as to their value. The plaintiff entered his

At the trial, before *Bramwell*, B., at the Middlesex sittings in last Hilary Term, the following facts appeared.—The defendant was an attorney, and clerk to the board of

account in his ledger against the parish officers and sent in his bill to them, but afterwards sued the defendant for the work thus done.—*Held*, that the parish officers, and not the defendant who was merely their agent, were liable to the plaintiff.

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guardians and vestry clerk of the parish of Epsom; also clerk to the magistrates. In the year 1852, two surveyors, named Leewin and Penfold, were employed by the parish officers to make a survey and valuation of the parish for the purpose of a poor rate. The valuation and rate having been made, there were three appeals against it, viz., by a person named White, by the proprietors of certain gas works, and by the lessee of the grand stand on the race course. The defendant, having deemed it advisable that the valuation should be supported by the evidence of another surveyor, obtained the authority of the parish officers to procure one for that purpose. He then wrote to Penfold the following letter:—

“Epsom, 30th Nov. 1852.

“Mr. Henry Dorling having given notice of appeal against the rating of the grand stand, I hasten to inform you that I shall require your valuable services at the next Sessions at Newington.

“Do you know any experienced man whose evidence would back up the valuation made by you and Mr. Leewin? If so let me know.

“C. Penfold, Esq.”

“Yours truly,

“W. EVEREST.”

In consequence of this letter Penfold saw the plaintiff and engaged him to support the valuation. The defendant afterwards wrote to Penfold the following letter:—

“Epsom, 16th Dec. 1852.

“Dear Sir,—The receipt of your note has much vexed me, because I know the opposing parties will attribute your non-attendance to a conviction that you cannot defend your valuation, and the result will be most disastrous to its eventual success. Pray manage to send some one to value Mr. White's house, and also to support your view of the gas works.

"I have employed Mr. Rodgers to defend the rate before the bench, and enclose you his note from which you will gather what must be done.

"Cannot you send the gas engineer at Croydon to give useful evidence, also Mr. Fuller, the auctioneer, to speak to value of White's house.

"Yours very truly,

"W. EVEREST."

"P. S. Please engage the gentleman you mention on grand stand appeal."

"Epsom, 20th Dec. 1852.

"Dear Sir,—The appeals of Mr. White and of the Epsom Gas Company against the Epsom poor rate have been adjourned until Monday the 3rd January next: I hope that day will be convenient to you. Will you have the kindness to secure the attendance for that day of the gentleman of whom you spoke to me, if you think his evidence would be of weight as regards your valuation of the gas company.

"C. Penfold, Esq."

"Yours truly,

"W. EVEREST."

"Epsom, Jan. 5, 1853.

"Dear Sir,

"Dorling v. Poor Rate of Epsom.

"This appeal is fixed for the first case on Saturday morning. Will you therefore please be at the Sessions House Newington punctually by $\frac{1}{2}$ past 9 o'clock on that morning, and have the kindness to apprise Mr. Lee and the other gentleman.

"C. Penfold, Esq."

"Yours truly,

"W. EVEREST."

The plaintiff accordingly did the work mentioned in the particulars of demand. The defendant afterwards wrote to the plaintiff as follows:—

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"Epsom, Jan. 13, 1853.

"Dear Sir,—Will you have the kindness to let me have at your earliest convenience an account of your charges in relation to the Epsom appeal.

"Chas. Lee, Esq."

"Yours truly,

"W. EVEREST."

The plaintiff entered the account in his ledger against the parish officers and sent in his bill to them and sued them for the amount, but afterwards abandoned that action and commenced the present. The plaintiff, who was a witness, stated that he had no communication with the defendant except as attorney for the parish officers, and that on the occasion when Mr. Rodgers attended at the sessions in support of the rate, in consequence of the ^{defendant} plaintiff being clerk to the magistrates, the plaintiff communicated with Mr. Rodgers.

The defendant's counsel submitted that the facts did not shew any liability on the part of the defendant, who only acted as attorney for the parish officers. The learned Judge left it to the jury to say whether the defendant employed the plaintiff on the terms that the defendant was to be the paymaster. The jury found a verdict for the plaintiff, and leave was reserved to the defendant to move to enter a verdict for him.

Bovill, in the same term, obtained a rule nisi accordingly, against which

Kinglake, Serjt., and *T. Jones* shewed cause in last Easter Term (April 25).—The defendant is liable for the plaintiff's charges in this action. A bailiff may recover from the attorney in the cause the costs of executing a writ of ca. sa.: *Mailee v. Mann* (a), *Walbank v. Quarterman* (b); even although the bailiff was not specially nominated by the attorney: *Brewer v. Jones* (c). In *Walbank v. Quarterman*,
(a) 2 Exch. 608. (b) 3 C. B. 94. (c) 10 Exch. 655.

Maule, J., said: "The case of a bailiff is more like that of the officer of the Court than that of a witness. The inconvenience would be prodigious if it were held that the officer must look to the client for his fees; and there is no inconvenience in the other course." It is true that in *Robins v. Bridge (a)*, it was held that an attorney who had caused a witness to be subpoenaed, without any express contract, and without any circumstances from which a special contract could be implied, was not liable to be sued by the witness for his expense; but that decision proceeded on the ground that the attorney in serving a subpoena acted as the mere agent of the party in the cause. There Lord *Abinger, C. B.*, in delivering the judgment of the Court, said: "He does not make himself liable for anything, unless it is for those charges which he is himself bound to pay, and for which he makes a charge. If, therefore, he employs a stationer to do anything for which he makes a charge, he is liable." This is a similar case: the defendant would charge the parish for the business out of which the plaintiff's claim arises. Moreover, it appears from the correspondence that the defendant meant to be personally responsible: he is therefore liable even though he expressly contracted as attorney: *Ex parte Hartop (b)*, *Foster v. Blakelock (c)*. [*Pollock, C. B.*, referred to *Fendall v. Nokes (d)*.]

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Bovill and Thrupp, in support of the rule.—The authorities cited shew that though an attorney may be liable to a bailiff whom he has employed to execute process, he is not liable for the expenses of a witness whom he has subpoenaed. In *Walbank v. Quarterman (e)*, *Maule, J.*, said:—"It can scarcely need authorities to prove that the attorney is the

(a) 3 M. & W. 114.

(d) 7 Scott, 647.

(b) 12 Ves. 349.

(e) 3 C. B. 94.

(c) 5 B. & C. 328.

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party liable to the officer. The case of a witness is altogether different." That distinction was recognized in *Brewer v. Jones* (a). An attorney who subpoenas a witness is in the same situation as any other agent acting for a principal; he is not liable unless he expressly binds himself: *Robins v. Bridge* (b). In this case the plaintiff was not subpoenaed, but that circumstance makes no difference; he was employed to give evidence on the appeal, and the previous survey was in order to qualify him for that purpose. *Russel v. Reece* (c) was an action against an attorney of a railway company who contracted as such, but managed all the concerns of the company, there being no acting committee, and *Wilde, C. J.*, ruled that the attorney was not personally liable. In *Fendall v. Nokes* (d), there was some evidence that the attorney was the party to whom the credit was given. [*Pollock, C. B.*—Suppose an attorney employs a person to make researches with reference to a pedigree, telling him that it is required in a certain cause in which he is attorney, who is liable for the expenses?] *Primâ facie* the client would be liable, the attorney being a mere agent. Here there was evidence that the plaintiff looked to the parish officers for payment for he debited them in his books, and in the first instance sent in his bill to them.—They then argued that there was nothing in the defendant's letters to shew that they contracted to be personally liable. On this point they cited *Lewis v. Nicholson* (e).

Cur. adv. vult.

The judgment of the Court was now delivered by

BRAMWELL, B.—The plaintiff, an architect and surveyor,

- (a) 10 Exch. 655.
- (b) 3 M. & W. 114.
- (c) 2 Car. & K. 669.

- (d) 7 Scott, 647.
- (e) 18 Q. B. 503.

sought by this action to recover from the defendant, an attorney, a compensation for his time and trouble in qualifying himself to give evidence, and in attending to give and giving evidence, on some proceedings in which the parish officers of Epsom were parties. The facts are as follows:— There had been a survey and valuation of the parish for the purposes of rating, and the proceedings questioned the rates made on the basis of that valuation. It was thought desirable that the evidence of the valuer should be supported by some competent witness, and the defendant, at the desire and with the authority of the parish officers, wrote to the valuer to secure the services of some person for that purpose. The valuer accordingly communicated with the plaintiff, who, to qualify himself to give evidence, examined the premises in respect of which there was the litigation, and afterwards gave evidence as to their value. It is to recover a compensation for this the action is brought. The plaintiff entered his account in his books against the parish officers, sent in his bill to them, and sued them, but for some reason abandoned that action and commenced the present. He clearly considered *them* therefore and not the defendant as his debtors, and he stated in his evidence that he had no communication with the defendant except as attorney of the parish officers; and in one case, where in consequence of the defendant being clerk to the magistrates before whom it was heard he did not appear but another attorney did, the plaintiff communicated with him. The question was left to the jury, who found for the plaintiff, but we are of opinion there was no evidence in support of that finding and that the defendant's rule to enter a verdict pursuant to leave reserved must be made absolute.

It is a clear rule that where a person is professedly acting as agent for another the principal is bound and not the agent. Now an attorney is in that position. He is the agent of his client, and is acting for him. The authorities

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are to that effect: *Robins v. Bridge* (a), *Hartop v. Jukes* (b), per *Maule, J.* (c). It is clear that according to those cases the defendant would not have been liable had he merely subpoenaed the plaintiff: can it make any difference that the plaintiff attends without subpoena, or that to make his attendance useful he previously surveys the premises? Is the defendant thereby liable, not only for the previous labour of surveying but also for the attendance to give evidence, or is he liable for the former part and the parish officers for the latter? We think not. It is undoubtedly more convenient that the engagement of the witness should be supposed to be with the party rather than with the attorney. The attorney may die, or be changed, before the witness has finished the entire duty of qualifying himself to give evidence and giving it. Then suppose he gives unfair evidence, dishonestly suppressing something for the benefit of the party, or does not properly qualify himself by the previous survey which he has undertaken, and thereby the party sustains a loss, who is to sue him for breach of duty, the party or the attorney, for the engagement must be taken to be with him if he is to pay for its performance.

We are of opinion therefore that *prima facie* the party, and not the attorney, is liable for such a claim as the present. No doubt it is competent to the parties to arrange otherwise and it was said that they had done so, and that the defendant's letters shewed that he was to be personally liable. But we are of opinion that is not so, and that the letters are entirely consistent with the general presumption that he was acting merely as attorney or agent: and indeed, in this case, the plaintiff had put his own interpretation on these letters, and we think correctly, that the parish officers were his debtors.

Rule absolute.

(a) 3 M. & W. 114.

(b) 2 M. & Sel. 438.

(c) 3 C. B. 96.

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LINDUS v. MELROSE and Others.

Judgt. aff'd in error
June 12. *B. H. L. N. 171*

THE declaration stated that the defendants, on the 31st December, 1856, by their promissory note now overdue, promised to pay to one Frederick Shaw, or order, the sum of 600*l.* three months after date. And the defendants then delivered the said note to the said F. Shaw, who indorsed the same to the plaintiff; but the defendants did not pay the same.

Plea.—The defendants say that the said alleged note is not their note as alleged.—Issue thereon.

At the trial, before *Channell, B.*, at the Middlesex sittings in the present Term, it appeared that the defendants were three directors of a Joint Stock Company, established under the 19 & 20 Vict. c. 47, with limited liability, and called “The London and Birmingham Iron and Hardware Company, limited;” and that one F. Shaw, who had carried on business as an ironmonger, having sold to the Company his stock in trade, the defendants in payment thereof, signed and delivered to F. Shaw the following promissory note, which was countersigned by the secretary of the Company,—

“£600.

“London, December 31st, 1856.

“Three months after date we jointly promise to pay Mr. Frederick Shaw, or order, six hundred pounds for value received in stock on account of the London and Birmingham Iron and Hardware Company, Limited.

Payable at the London
Joint Stock Bank Company,
Princes St., Mansion House,
Edwin Guess, Secty.

James Melrose,
G. N. Wood,
John Harris,

} Directors.

(Indorsed) F. Shaw.”

The following promissory note was signed by three directors of a Joint Stock Company, incorporated, with limited liability, under the 19 & 20 Vict. c. 47, and countersigned by the secretary of the Company.—
“London, Dec. 31, 1856. Three months after date we jointly promise to pay S., or order, six hundred pounds for value received in stock, on account of the London and Birmingham Iron and Hardware Company.”—*Held*, that the note was binding on the Company, and not on the directors who signed it.

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It was objected, on the part of the defendants, that they were not personally liable on the note, and that it only bound the Company. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a verdict for them.

Bovill having obtained a rule nisi for that purpose,

Montagu Chambers and *Manisty* now shewed cause.—The question depends on “The Joint Stock Companies Act, 1856” (19 & 20 Vict. c. 47). By section 13, upon registration of the memorandum of association, the shareholders become a body corporate. By section 43, “A promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any Company registered under this Act, if made, accepted, or indorsed in the name of the Company by any person acting under the express or implied authority of the Company.” This promissory note is not made in the name of the Company but of the directors: it is “*we*,” that is, the directors, “jointly promise to pay.” It may be, that this being a Company with limited liability, the payee of the note preferred the unlimited responsibility of three of the directors. The only difference between this case and *Healey v. Story* (a) is, that there the directors jointly and *severally* promised to pay. *Alderson*, B., there said:—“The plain grammatical meaning of the words is, ‘we jointly promise and we severally promise,’ that is to say, we *personally* promise.” Here the absence of the word “*severally*” may be explained by the supposition that the directors may have been willing to incur the responsibility with the others, though not alone. In *Penkivil v. Connell* (b) the defendant, a director of a Joint Stock Company, together with three other directors, signed the following promissory note:—

(a) 3 Exch. 3.

(b) 5 Exch. 381.

"We, the directors of the Royal British Bank of Australia, for ourselves and the other shareholders of this Company, jointly and severally promise to pay H. W. the sum of 200*l.* for value received on account of the Company;" and this Court refused to stay the proceedings under the Winding-up Act, 11 & 12 Vict. c. 45, s. 73, on the ground that it was not the note of the Company, but one on which the defendant was personally liable. In *Allen v. The Sea Fire and Life Assurance Company (a)*, the instrument signed by the directors did not contain any promise by them to pay, but only a direction to the cashier to charge the funds of the Company in favour of the person named; and the question was whether it operated as a promissory note, for, if so, it could only bind the Company. [*Channell, B.*, referred to *Aggs v. Nicholson (b)*.] There the directors "by and on behalf of the Society" promised to pay. No doubt, the 43rd section of the 19 & 20 Vict. c. 47, was expressly framed to obviate the conflict of decision which arose upon the language of the 7 & 8 Vict. c. 110, s. 45. That Act required that the note should be made by and in the names of two of the directors of the Company, and should be expressed to be made by them on behalf of the Company. By the 19 & 20 Vict. c. 47, the note is to be made *in the name of the Company* by any person acting under the express or implied authority of the Company. [*Channell, B.*—It may be read thus:—"We promise to pay on account of the Company, for value received."] The words will have effect if read according to their ordinary construction, and therefore ought not to be transposed. Besides, it is not enough to say "we on account of the Company promise to pay," for the Act requires that the note should be made in the name of the Company. This note, not being in conformity with the requisites of the

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(a) 9 C. B. 574.

(b) 1 H. & N. 165.

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Act, will not bind the Company, for they can only be made liable by a contract under their corporate seal, or in the mode prescribed by the Act.

Bovill and *J. Brown*, in support of the rule.—The question is, first, whether the directors who signed the note intended to bind themselves or the Company; and secondly, if they intended to bind the Company, whether they have used sufficient words for that purpose. It is evident that the directors never intended to bind themselves, for the consideration for the note was stock supplied to the Company, and the note is countersigned by the secretary of the Company. Then, with respect to its language, the words “on account of the Company,” should be read “on behalf of the Company.” *Story v. Healey* (a) proceeded on the ground that the defendants jointly and severally promised. In *Penkivil v. Connell* (b) the note was also joint and several. [*Bramwell*, B., referred to *Maclae v. Sutherland* (c).] In *Allen v. The Sea Fire and Life Assurance Company* (d), the note contained the words “on account of the corporation,” and that was held to bind the Company. *Aggs v. Nicholson* (e) is also an authority in favour of the defendants. The language of the 43rd section of the 19 & 20 Vict. c. 47, is not materially different from that of the 7 & 8 Vict. c. 110, s. 45.

POLLOCK, C. B.—The rule must be absolute. The question is, what is the meaning of this instrument, reference being had to the law and the facts proved. I am of opinion that the expression “for value received in stock” was meant to indicate the sort of consideration which

(a) 3 Exch. 8.

(b) 5 Exch. 381.

(c) 3 E. & B. 37.

(d) 9 C. B. 574.

(e) 1 H. & N. 165.

passed with reference to the note, and that these words ought to be read as if they were in a parenthesis. Then, according to all the rules of construction, they may be taken out, and the instrument read thus:—"Three months after date we jointly promise to pay Mr. Frederick Shaw, or order, six hundred pounds, on account of the London and Birmingham Iron and Hardware Company." This promissory note cannot bind at once the individual directors and the Company for which they were acting as agents; and the question is, what is the most reasonable construction to be put upon it? When the matter comes to be examined and presented in the way which the learned counsel have ably done, though, no doubt, there are considerations which apparently operate one way and arguments which support either proposition, I entertain no doubt that this instrument was drawn by the directors on behalf of the Company, and that they are not personally liable. The cases which have been cited do not throw any great light on the subject, but I consider every one was correctly decided, and indeed could not well have been decided otherwise. The question being, substantially, whether we are to consider this as the note of the Company or of the directors who signed it, on reading the instrument as I have suggested, and looking to the surrounding circumstances, I entertain not the slightest doubt that in fact it was intended as the note of the Company, and in law ought to be so construed.

BRAMWELL, B.—I am of the same opinion. The statute does not prescribe any particular form in which a note is to be drawn; but it is enough if it purports to bind the Company, and is made by some person competent to bind the Company. Then, does this note purport to bind the Company? for, if so, it does not purport to bind the directors personally. What was really intended, no one can,

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under the circumstances, have any doubt; and the question is, whether the words used will enable us to say that the intention has been carried out. If the words had been, "Three months after date we jointly promise to pay Mr. Frederick Shaw six hundred pounds for value received by the Company," and it had been signed by three directors and countersigned by the secretary, I am by no means sure that it would not have bound the Company, although it did not state that it was made "on account of the Company." It is not, however, necessary to decide that point, because here we have the words "for value received in stock." I agree with the Lord Chief Baron that those words ought to be read in a parenthesis, for if not, the instrument would stand thus:—"for value received in stock by us on account of the Company." Then, if we suppose a personal liability on the part of the directors, there would be a promise by them to pay for value received on account of the Company, and the note would be bad on the face of it as shewing a consideration to the Company and not to the directors. Therefore we must read in a parenthesis the expression "for value received in stock," in which case there is an end of all difficulty; or if the words "on account of the Company" refer to "value received in stock," then, inasmuch as that is not value received by the defendants but by the Company, the Company are bound. So, that in either view the note is not binding on the defendants personally.

CHANNELL, B.—I entertained some doubt in the course of the argument, but have arrived at the conclusion that the rule ought to be absolute. Although the decided cases may assist in throwing some light on the subject, the question really depends on the construction of the note. The three defendants signed the note as directors; and the question is whether, under the circumstances, they signed it with

intent to bind themselves or the Company. Without saying that under all circumstances the words "on account of" are equivalent to "on behalf of," I think that the defendants purport to bind the Company. If the words "for value received in stock" be read in a parenthesis, all doubt is removed; or if the words "on account of the Company" be read "we jointly promise on account of the Company," in like manner there is an end of the question.

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Rule absolute.

HILL v. BALLS.

June 12.

CASE.—The declaration stated that the defendant was possessed of a certain horse, and the said horse was afflicted with a certain infectious disease, to wit, the glanders; yet the defendant, well knowing the said horse to be afflicted with the said disease, caused the said horse to be sold by auction at a certain horse repository; and the plaintiff, believing the said horse to be in a healthy state and condition, became the purchaser of the said horse at the said sale, and paid therefore a large sum of money, to wit, the sum of six pounds ten shillings; and by reason of the diseased state and condition of the said horse the same was utterly worthless to the plaintiff, and the plaintiff necessarily paid certain money, to wit, the sum of two pounds ten shillings to a veterinary surgeon for examining the said horse and reporting as to its state and condition; and in consequence of the said horse being put into a stable of the plaintiff's, wherein

A declaration stated that the defendant was possessed of a horse afflicted with an infectious disease, to wit, the glanders, and knowing the horse to be afflicted with the said disease, caused the horse to be sold by auction at a certain horse repository; and the plaintiff believing the said horse to be healthy became the purchaser, and paid therefore 6*l.* 10*s.*, and by reason of the diseased state of the horse the same was worthless to the plaintiff, and the plaintiff paid 2*l.* 10*s.* to a veterinary surgeon for examining the said horse; and in consequence of the horse being put into a stable with another horse of the plaintiff's, the said other horse became infected and died.—*Held*, that the declaration disclosed no cause of action.

Per *Martin, B.*, and *Bramwell, B.*, that it is not illegal to sell a glandered horse; *dubitante Pollock C. B.*

A horse repository is not necessarily a public and open place within the meaning of these words in the 16 & 17 Vict. c. 62, s. 1.

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a certain other horse of the plaintiff's of great value, to wit, of the value of fifty pounds, then was, the said last mentioned horse of the plaintiff became infected with the said disease and of the said disease died, and the plaintiff was forced and obliged to pay a large sum of money, to wit, the sum of ten pounds in, and about endeavouring to cure the said last mentioned horse of the said disease, &c.

Demurrer and joinder.

Raymond, in support of the demurrer (*a*).—It may be conceded that knowingly to expose a person affected with a contagious and dangerous disease in a public place is a public nuisance. [*Pollock*, C. B., referred to *Rex v. Vantandillo* (*b*) and *Rex v. Burnett* (*c*).] So, also to bring a horse infected with the glanders into a public place may be a nuisance and punishable at common law, as was held in *Regina v. Henson* (*d*), or under the statutes 11 & 12 Vict. c. 107, and 16 & 17 Vict. c. 62, which are continued by 19 & 20 Vict. c. 101. But the declaration in the present case does not shew any cause of action; there is no allegation that there was any fraud or false representation at the sale. It is consistent with the declaration that the plaintiff was told by the defendant that the horse was glandered when he bought it. Again, there is no statement that the auction was in a public place or a nuisance to the public; the sale may have taken place in a repository for the sale of diseased horses. If the defendant did illegally expose the horse, it is not shewn that the plaintiff suffered any damage from the exposure; the plaintiff therefore can only sue for the penalty under the statute. There is no reason why a horse having an infectious disease should not be sold.

(*a*) Easter Term, May 4. Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.

(*b*) 4 M. & Sel. 73.
(*c*) 4 M. & Sel. 272.
(*d*) 1 Dears. C. C. 24.

Hayes, Serjt., in support of the declaration.—The bringing a horse infected with the glanders into a public place, to the danger of infecting the Queen's subjects, constitutes a misdemeanor at common law: *Regina v. Henson* (a). The declaration states that the defendant, well knowing the horse to be so affected, caused the horse to be sold by auction at a horse repository, which is in its nature a public place where other horses are bought. In *May v. Burdett* (b), it was held that a person who keeps a dangerous animal, as a monkey, accustomed to bite and attack mankind, with knowledge that it is dangerous, is *prima facie* liable to an action at the suit of any person injured by such animal without any averment in the declaration of negligence or default in the securing or taking care of it. Here, in order to render the defendant responsible for the injury occasioned to the plaintiff by the communication of the disease, it is only necessary to shew that he knowingly sold to the plaintiff the horse which communicated the disease to the plaintiff's horse. In *Leame v. Bray* (c), Lord *Ellenborough* said,—“If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass.” A fair meaning must be given to the declaration. To read it as if it was consistent with the allegations contained in it, that the plaintiff was told that the horse was glandered, is to construe it with the strictness which a special demurrer might have justified, but which is out of place at the present day.

Raymond, in reply.—The damage complained of did not arise necessarily from the act of the defendant. The plaintiff was under no obligation to buy the horse: he did so

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(a) 1 Dears. C. C. 24.

(b) 9 Q. B. 101.

(c) 3 East, 593, 595.

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voluntarily. In order to render the defendant liable in the present action, it is not enough to shew that the defendant might have been indicted for a public nuisance, if the plaintiff, by his own wilful act, contributed to the damage which resulted to himself: *Caswell v. Worth* (a).

Cur. adv. vult.

POLLOCK, C. B., now said.—The Court are all of opinion that the declaration is bad, inasmuch as it does not set forth facts which constitute a cause of action against the defendant. It states that the horse was glandered; that the defendant knew it, but the plaintiff did not; that the defendant sold the horse to the plaintiff:—without any allegation that there was any false representation or fraud, or warranty. My learned brothers are of opinion that the declaration does not disclose a cause of action so as to justify us in giving judgment for the plaintiff. I entertained some doubt on the subject, because I think it questionable whether the sale of a glandered horse is not in itself an illegal act. But looking at the form of the declaration, I am not prepared to dissent from the opinion which my brothers have formed; and there must therefore be judgment for the defendant.

MARTIN, B.—This was a demurrer to a declaration. The material facts alleged were, that the defendant was possessed of a horse which he knew had the disease of glanders; that he caused it to be put up for sale by auction at a horse repository, and the defendant purchased it believing it to be sound, and sustained damages in consequence of his becoming possessed of it. The arguments in support of the declaration were, first, that by the statute 16 & 17 Vict. c. 62, continued by 19 & 20 Vict. c. 101, it was illegal to

(a) 5 E. & B. 849.

sell a glandered horse; but this is not so, it is illegal knowingly to bring or attempt to bring a glandered horse for sale into any market, fair or other open or public place where animals are commonly exposed for sale; but there is nothing in the statute to prohibit the simple sale of such a horse, and there is, I think, nothing in this declaration to shew that this horse was brought to such a place to be sold. It is alleged that he was caused to be sold by the defendant by auction at a horse repository; but there does not seem to me a sufficient allegation that this place was such prohibited place. The place contemplated by the statute is, apparently a place open for the public to sell and buy horses; such auction marts as Tattersall's or Aldridge's may be such places; but a horse repository is not necessarily such a place, and for all that appears in the declaration, it may have been a place intended for the sale of diseased horses. There was no authority of any kind cited to shew that it is illegal at common law to sell a glandered horse. Surely such a horse may be sold for the purpose of being destroyed; the skin must be worth something, and I am not aware that the carcase is not useful for the ordinary purposes to which horse flesh and the other parts of the dead horse are used. The case of *Regina v. Henson* (a) was relied on, but the offence there was the taking the diseased horse into a public market; and there is nothing in the case to shew that the simple sale of such a horse is illegal. The only other case cited was *May v. Burdett* (b), but I do not think the principle of it bears upon the present; for it is quite consistent with every thing averred in this declaration, that the defendant told the auctioneer that the horse was glandered and to sell him as such; and, indeed, that the plaintiff may have been so told, but that relying upon

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his own judgment he believed the horse was sound and bought him, notwithstanding he had notice that the horse was unsound.

The declaration is in form to me entirely new, and without the least desire to return back to the system of special demurrers, I think that when there is a well known, plain, simple, and intelligible form for stating causes of action in respect to sales of animals any deviation from it ought to be narrowly watched, otherwise one meaning will be alleged to belong to pleadings when they are demurred to, and another when the issues joined upon them are being tried at nisi prius. In my view of the law, when there is no warranty the rule "caveat emptor" applies to sales, and except there be deceit, either by a fraudulent concealment or fraudulent misrepresentation, no action for unsoundness lies by the vendee against the vendor upon the sale of a horse or other animal.

BRAMWELL, B.—I understand the plaintiff to make his case thus:—The defendant did an unlawful act and that act caused me damage. Now the act of the defendant, stated by the plaintiff, and supposed to be unlawful, is causing the horse to be sold by auction at a horse repository, the horse being glandered and the defendant knowing it. I am of opinion that this shews no illegality within the statute, as I think "the public place" in the 16 & 17 Vict. c. 62, s. 1, means a place to which the public has a right to come, as a fair or market, which this horse repository is not stated to be, and probably was not. For a similar reason I think no offence at common law is shewn. I know of no prohibition of merely selling a glandered horse. But assuming that the declaration shews an unlawful act, I am also of opinion that no damage is stated flowing from it.

The damage is stated thus:—"The plaintiff believing the horse to be healthy bought and paid for it, and the same was worthless, and the plaintiff paid for a veterinary surgeon examining it, and put it in a stable whereby another horse became infected, and the plaintiff paid for endeavouring to cure it." It is to be observed that consistently with this, the defendant may have told the plaintiff that the horse was glandered. But my brother *Hayes* so indignantly says, that that remark suits rather the days of special demurrers than the present time, that I will assume merely that the defendant committed no fraud; though I do not see why, if this action is maintainable, it would not be, though the defendant had told the plaintiff the horse was glandered, as the act of exposing to sale would have been equally illegal, and the damage would as much have resulted from it. But how does the damage flow from the act complained of? In truth it all flows from the plaintiff's buying the horse, and dealing with it as he did. Had he not bought it, he would have sustained none of the losses he complains of. Having bought it, had he thought fit at once to kill it, he would have sustained no loss but his first loss. But his buying it and dealing with it as he did are entirely his own acts, and not the result in any sense, certainly not the natural or necessary result, of any act of the defendant. The plaintiff therefore, in my opinion, fails in both his propositions, and there must be judgment for the defendant.

But it may be said, that though no indictable offence is shewn, yet, that a sale of a glandered horse by a person knowing it to be so, gives a right of action to a buyer ignorant of the defect. In considering this, it is to be borne in mind that no fraud of any sort is to be assumed, no suppression of the marks of the disease or other falsity or concealment; and it is said, that if this were not so, many things with most mischievous defects not apparent might be knowingly sold

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to innocent purchasers. But in truth the buyer knows of the possible existence of the defects, or he does not. If he does he has no right of complaint, if he chose to purchase without a warranty; and if he does not, he ought not to be any better off for his ignorance. In short the rule "caveat emptor" as reasonably applies to the sale of a glandered horse as to any other case. I am of opinion, therefore, the defendant is entitled to judgment.

Judgment for the defendant.

June 9.

SIDWELL v. MASON.

Debt for goods sold and work done. Plea.—Statute of Limitations. The plaintiff, within six years, had sent in his bill to the defendant. The defendant wrote in answer as follows:—"I have received your bill. It does not specify sufficiently to which cottages the work is done, for instance (as to some of the items) I do not know where all this is done, I shall feel

DEBT for goods sold, work and labour, and on an account stated.

Plea.—The Statute of Limitations.

The cause was tried before the Under Sheriff of Middlesex, when the plaintiff proved that he did certain work amounting to 7*l.* 10*s.* 2*d.* upon some cottages for the defendant, in and prior to January 1851, and sent in his bill in October of that year. The action was commenced in February 1857.

The following letter was put in as an answer to the Statute of Limitations:—

"Fordham Mills,
Halstead, Essex.

1 Nov. 51.

"Dear Sir,

"I have received your bill. It does not, I think,

obliged if you will more particularly explain. It is my wish to settle your account immediately, but being at a distance I wish everything very explicit and correct. I have asked H. to mark the agreements and send them to me, and I will return them by the first post with instructions to pay if correct."—*Held*, that the letter was a sufficient acknowledgment to take the debt out of the Statute of Limitations.

specify sufficiently to which cottages the work is done, for instance, you say—

	s.	d.
52 feet feather boards . . .	9	6
Man 1 day, 200 10d. nails . . .	5	8
Bricklayer 1 day	6	6
Bricks and mortar	3	3
100 of tiles	4	9
Labour as per agreement . . .	4	6
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"I do not know where all this is done. I shall feel obliged if you will more particularly explain, and take your agreements to Mrs. Heath's. It is my wish to settle your account immediately, but being at a distance I wish every thing very explicit and correct. I have asked Mrs. Heath to mark the agreements and send them to me, and I will return them by the first post with instructions to pay, if correct.

"Yours respectfully,

"To Mr. Sidwell.

"J. MASON."

The Under Sheriff thought the letter a sufficient acknowledgment, and the jury, under his direction, found a verdict for the plaintiff for the full amount, leave being reserved to the defendant to move to enter the verdict for him.

Pearce having obtained a rule nisi accordingly,

Gibbons now shewed cause.—The case of *Spong v. Wright* (b), on the authority of which this rule was granted, is not analogous to the present case, for a promise to pay if the

(a) These were the first six items in the bill sent in.

(b) 9 M. & W. 629.

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demand is just does not admit the existence of any debt. Here there is a clear admission of the debt, "It is my wish to settle your account." In saying "I will pay if correct;" the defendant only raises a question as to the amount.—He also referred to *Colledge v. Horn* (a) and *Waller v. Lacy* (b).

Pearce, in support of the rule.—*Rackham v. Marriott* (c) governs this case. The promise, if any, is not absolute but conditional on the defendant being satisfied of the correctness of the bill by the explanation he required. There was no evidence of any compliance with the condition. [*Pollock*, C. B.—There was considerable doubt in the minds of several members of the Court whether the acknowledgment in *Rackham v. Marriott* was not sufficient. I consider it an extreme case.—He also referred to *Hart v. Prendergast* (d), *Williams v. Griffiths* (e), and *Smith v. Thorne* (f).

POLLOCK, C. B.—I am of opinion that the rule must be discharged, as the defendant's letter takes the case out of the Statute of Limitations. It contains an acknowledgment that some debt was due. The defendant does not deny that the work had been done somewhere, a bill for such work being before him. He asks for further explanation in a particular manner which might be satisfactory to himself, but this is not made a condition precedent to his promise to pay the bill if correct. Mr. *Pearce* says that the letter contains no admission of any debt, but a mere promise to pay if the defendant is satisfied in a particular manner that

(a) 3 Bing. 119.

in Error, *anté*, p. 196.

(b) 1 Scott, N. S. 186; S. C.
 1 Man. & G. 54

(d) 14 M. & W. 741.

(e) 3 Exch. 335.

(c) 1 H. & N. 234. Affirmed

(f) 18 Q. B. 134.

the plaintiff's claim was correct. If that were the true meaning of the letter the acknowledgment would be insufficient. But it is clear that it is not so. The letter mentions specifically the first six items in the bill, but there are many other items which are not objected to. I think that there is a clear and unqualified admission that a debt is due, and a promise to pay the demand if correct.

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MARTIN, B.—I am of the same opinion. The debt arose in respect of work done by the plaintiff for which a bill was sent in, which may be correct or incorrect. The defendant in his letter complains of the manner in which the bill is made out. He admits that the work has been done, and wishes a more particular account. He says, in effect, make it out fully, and if correct I will pay. That contains an admission of a debt to an amount which may be estimated by a jury, and a promise to pay the amount if found to be correct. *Rackham v. Marriott* (a) and *Hart v. Pendergast* (b) are cases where the acknowledgment was coupled with a hope, and not a promise to pay. It was said that the amount of the debt must be ascertained; but the contrary doctrine was established in *Waller v. Lacy* (c) and other cases.

BRAMWELL, B.—I thought that the rule ought not to have been granted. I do not think the decisions are in a satisfactory state. Originally the statute 21 Jac. 1, c. 16, enacted that all actions of debt or on the case, founded on any contract without specialty, should be commenced within six years after the cause of action, and not afterwards. It was found that injustice was done, because people relied on

(a) 1 H. & N. 234. In Error,
antè, p. 196.

(b) 14 M. & W. 741.
(c) 1 Man. & G. 54.

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subsequent promises. The Courts, to obviate this, held that a cause of action arose when the new promise was made. Then they proceeded to hold that not only a promise but even an acknowledgment of the debt was sufficient, and at last an acknowledgment accompanied by a refusal to pay. That however was set right in *Tanner v. Smart* (a). The 9 Geo. 4, c. 14, provides that "in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient," &c. The word "acknowledgment" is used not as meaning something different from "promise," but as applicable to actions of debt. That construction was put upon the word by the Court in *Smith v. Thorne* (b). It is enough however if there is an acknowledgment unaccompanied by expressions which control its effect. It is a mistake to suppose that because a man expresses a hope to pay when he acknowledges the debt, that therefore the acknowledgment is to be taken as the mere expression of a hope to pay. If a man says "the bill is due, I hope to be able to pay next month," that is an acknowledgment; the hope expressed is not inconsistent with a promise to pay immediately. The letter in the present case contains no express promise in words; but a man, in acknowledging that a debt is due, does not ordinarily promise to pay it; and the expression of an intention to pay if the bill is correct is not inconsistent with the obligation to pay immediately.

WATSON, B., concurred.

Rule discharged.

(a) 6 B. & C. 602.

(b) 18 Q. B. 134.

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BILL v. RICHARDS.

June 1.

SCIRE FACIAS on a judgment obtained by the plaintiff against a Company incorporated by the 16 & 17 Vict. c. lxiil., by the name of "The Darent Valley Railway Company," and in which the defendant was the registered holder of 650 shares.

Plea, for defence on equitable grounds.—That the defendant was applied to and requested by the plaintiff and others to become a transferee of shares in the said Company, as the nominee of Messrs. Earl & Merritt and for their benefit and not for the defendant's benefit; and upon the representation of the plaintiff and others that if the defendant would become such transferee he should incur no responsibility or liability whatever upon or in respect of such shares: that the defendant relying upon the said representation, did comply with the said request and did become a transferee of certain shares in the said Company, to wit, the shares in the declaration mentioned, as such nominee of Messrs. Earl & Merritt, and for their benefit and not for the defendant's benefit: that the defendant was induced by such representation as aforesaid, and not otherwise, to become and did in consequence

To a declaration in scire facias against a shareholder of a railway Company, the defendant pleaded, for defence on equitable grounds.—

That he was requested by the plaintiff to become a transferee of shares in the Company, as the nominee of E. and M. and for their benefit and not for the defendant's benefit, and upon the representation of the plaintiff that if the defendant would become such transferee he should incur no responsibility or liability whatever in respect of such shares: that the defendant relying upon the said

representation did become a transferee of the shares in the declaration mentioned, as such nominee of E. and M. and for their benefit and not for the defendant's benefit: that the defendant was induced by such representation, and not otherwise, to become, and in consequence thereof, became such transferee of the shares: that the defendant never had any interest in the shares, or in the Company, except as such nominee: that he never derived any profit, benefit, or advantage whatsoever from the shares or the Company: that the Company never commenced the railway, and the scheme had been and is entirely abandoned: that the plaintiff knew the circumstances under which the defendant became such transferee, and stood by and suffered and permitted the defendant to become such transferee upon the said representation, and he is now unjustly and inequitably and contrary to the said representation, and in fraud thereof, seeking to charge the defendant and make him responsible and liable as a shareholder of the Company to him, the plaintiff.—*Held*, on demurrer, that the plea afforded no equitable or legal defence.

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thereof become such transferee of the said shares as the nominee of Messrs. Earl & Merritt, and for their benefit and not for his benefit: that the defendant never had any interest in the said shares or in the said Company, except as such nominee as aforesaid: that he never was to derive or acquire, and he never in fact did derive or acquire any profit, benefit, or advantage whatsoever from the said shares or the said Company: that the said Company never commenced the said railway and the scheme thereof, and for which the said act of parliament was obtained, has been and is entirely abandoned, and no benefit, profit, or advantage whatever has ever been made, derived, or acquired by the said Company: that the plaintiff well knew the circumstances under which the defendant became such transferee as aforesaid, and stood by and suffered and permitted the defendant to become such transferee under the circumstances and upon the said representation; and he is now unjustly and inequitably, and contrary to the said representation and in fraud thereof, seeking to charge the defendant and to make him responsible and liable as a shareholder of the said Company to him the plaintiff.

Demurrer and joinder therein.

Brett, in support of the demurrer.—First, the plea affords no legal defence. It confesses the liability arising from the facts stated in the declaration, but does not avoid it. The defendant, being a shareholder, is bound by the judgment against the Company: 8 & 9 Vict. c. 16, s. 36. The defence attempted to be set up is, that the defendant is not liable to the plaintiff, because he was induced by the fraud of the plaintiff to accept a transfer of the shares to hold for the benefit of others, and on a false representation that he should incur no liability in respect of the shares. But it is

not alleged that the representation was fraudulent, or that there was any concealment of material facts from the defendant. It is a representation made by a person who is not connected with the Company, and may have been made years ago and perfectly bonâ fide. [*Bramwell*, B.—The only way in which the defendant would not be responsible, would be by an indemnity from Earl and Merritt or some one else, and if that is the meaning of the plea, how is it any defence?] It will probably be argued that the plea is good to avoid circuity of action; it does not however set up matter of contract, but rests solely on an alleged representation.—Secondly, the plea affords no defence on equitable grounds. Assuming the facts stated in the plea to be true, they do not amount to a charge of fraud or of breach of contract. There is no authority on the subject, because there is no instance of such a plea.

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Raymond, contra.—The plea discloses a good equitable defence. It states that the defendant was induced to become a shareholder upon the representation of the plaintiff that he should incur no responsibility in respect of his shares, and that the plaintiff is suing him in fraud of that representation. Those facts are admitted by the demurrer. It may be that the defendant is liable to the public in general, but the plaintiff has no right to make this claim against him. There is sufficient on the face of the plea to constitute a contract: it may be read thus,—“in consideration that you, at my request, will become a shareholder, I undertake that you shall incur no liability.” Upon such a contract a Court of equity would restrain the plaintiff from proceeding against the defendant. [*Bramwell*, B.—Suppose the Company was prosperous, and the defendant sold the shares for more than sufficient to indemnify himself, would he not be liable?] Not under the circumstances stated in this plea.

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In Story on Equity Jurisprudence, vol. 1, sect. 384, it is said, "Another class of constructive frauds of a large extent, and over which Courts of equity exercise an exclusive and very salutary jurisdiction, consists of those where a man designedly or knowingly produces a false impression upon another, who is thereby drawn into some act or contract injurious to his own rights or interests * * * No man can reasonably doubt, that if a party, by the wilful suggestion of a falsehood, is the cause of prejudice to another, who has a right to a full and correct representation of the fact, his claim ought in conscience to be postponed to that of the person whose confidence was induced by his representation. And there can be no real difference between an express representation, and one that is naturally or necessarily implied from the circumstances." This doctrine of constructive fraud is supported by several authorities. In *Fowkes v. Joyce (a)*, a grazier, driving a flock of sheep to London, was encouraged by an innkeeper to put his sheep into pasture grounds belonging to the inn. The landlord seeing the sheep, consented that they should stay there one night and then distrained them for rent: a Court of equity relieved the grazier against the distress. In *Raw v. Pote (b)*, A., on his marriage with B., settled lands for her jointure, which were subject to an entail. A brother of A. was privy to the entail, engrossed the jointure deed, and had the deed of entail in his custody and concealed it. A., the husband, having devised the inheritance of the premises to J. S., died without issue, and J. S. married the widow. The brother having set up the entail and brought ejectment, a Court of equity granted a perpetual injunction. That case is stronger than the present, for there the party merely allowed a settlement to be made, as if there had been no entail. [*Martin, B.*—In both those cases the

(a) 2 Vern. 129.

(b) 2 Vern. 239.

conduct of the party amounted to actual fraud.] A party may be estopped by his own conduct, even though there is no fraud. In *Watts v. Hyde* (a) a person in pecuniary difficulties entered into a composition deed by which he covenanted to pay 1,500*l.* to trustees, and to effect an insurance on his own life for that amount. He paid 500*l.*, and then effected an insurance for 1000*l.* only. One of the creditors, who had signed the deed, brought an action against the debtor for his debt, insisting that the deed was void in consequence of the breach of covenant to insure for 1,500*l.* But it being shewn that the creditor was aware of the amount of the insurance soon after it was effected, and his conduct being considered by the Court as shewing acquiescence in such breach of covenant, he was held not to be entitled to take advantage of it, and was restrained by perpetual injunction from bringing any action against the debtor. *Wing v. Harvey* (b) and *Stone v. Godfrey* (c) also afford instances of estoppel by the conduct of the party, even though he remained passive. [*Pollock*, C. B.—We have laid down a rule that a plea by way of equitable defence ought not to be allowed, unless the Court can do complete justice between the parties. Now, here the plea does not exclude the possibility of the defendant being able to recoup himself: perhaps he is indemnified, or there may be other shareholders liable, and a Court of equity would inquire into the whole matter, and adjust the equitable rights of the parties.] Even at law this plea is good by way of estoppel. Fraud is not necessary to create an estoppel; it is sufficient if a person by his conduct wilfully induces another to believe in a certain state of facts and so alter his position: *Pickard v. Sears* (d), *Freeman v. Cooke* (e). A person may be estopped by many acts which

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(a) 17 L. J. Chan. 409.

(d) 6 A. & E. 469.

(b) 23 L. J. Chan. 511.

(e) 2 Exch. 654.

(c) 5 De Gex, M. & G. 76.

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would not render him liable to an action for deceit. [*Bramwell*, B.—The defendant did not misrepresent the facts: all he said was that the concern was a safe one, and that Earl and Merritt were responsible people. *Pollock*, C. B.—The plea does not state that the plaintiff had anything to do with the Company; he might have spoken quite honestly, and then, some years after, he supplied goods to the Company, then why is he not to be paid? The plea ought to have alleged that the plaintiff, intending to deceive and defraud the defendant, fraudulently induced him to become a shareholder.] The plaintiff having wilfully made a false representation and induced the defendant to act upon it, cannot now turn round and sue the defendant. [*Bramwell*, B.—Suppose a person buys an estate on the representation of the vendor that it is not subject to any easement, and some years afterwards the vendor discovers that there has always been a right of way over it, is he estopped from using the way?]

Brett was not called on to reply.

POLLOCK, C. B.—We are all of opinion, for the many reasons assigned in the course of the discussion, that this plea is bad. For my part, I think it bad because it is clear, upon the facts disclosed by it, that this Court cannot do all the equity which the subject requires. It is also bad, because it does not lay a foundation of defence by alleging that the representation was made fraudulently, and with an intent to deceive.

MARTIN, B.—I think the plea is bad for the reasons given by Mr. *Brett* in his argument. Consistently with every allegation in the plea, the representation may have been made in perfect honesty, the plaintiff representing nothing more than he believed to be true: that afterwards

the debt was contracted, and the plaintiff, not being able to obtain payment from the funds of the Company, proceeds against the individual shareholders. There is nothing wrong in that. The plea, indeed, states that the plaintiff is unjustly and in fraud of the representation seeking to charge the defendant; but I do not understand how there can be fraud in making an honest representation to another, on which he may act or not as he thinks fit.

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BRAMWELL, B.—This plea is so bad that it is difficult to give reasons for holding it so. It is suggested that it is good on this ground:—"You made a representation and thereby induced me to become a shareholder in the Company, and now you seek to fix me with responsibility for those shares." That implies either an undertaking on the part of the plaintiff that he would not sue the defendant, or a fraudulent representation. There is indeed a *tertium quid*, viz., where a person makes a representation as to the existence of certain matters which do not exist, he may be estopped by that statement. On none of those grounds can this plea be supported. The allegation that "the plaintiff represented to the defendant that he should incur no responsibility" is not the assertion of a fact, but the assertion of the plaintiff's conclusion from a certain state of facts, and no person is precluded from asserting his conclusion from facts, though erroneous. If I say there are 5000*l.* in a certain Company, I may afterwards be estopped from alleging the contrary, but if I say it is a good concern because 5000*l.* have been expended upon it, I am not estopped. Then Mr. *Raymond* says that the word "fraud" is in this plea, but that is senseless. "You told me I should not incur responsibility and now in fraud of that statement you are seeking to make me liable." How is that a fraud, unless the party wilfully made a false statement with intent to

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deceive. With respect to the cases cited, I do not dissent from them. *Stone v. Godfrey* proceeded on a principle perfectly intelligible, and (as at present advised) I think not an unreasonable one. A father in possession of land gave his daughter to understand that he held it as trustee for her and not in his own right, and on the faith of that representation she married. After her marriage the father claimed the land, but the Court said "No: having caused her to change her condition by the representation, you shall not be permitted to deny the fact." So with the other cases, they will be found to range themselves under the heads either of agreement, fraud, or estoppel. This plea is nothing of the kind.

WATSON, B.—My judgment is also in favour of the plaintiff; for some one or all of the reasons given. But there is another which appears to me quite conclusive. The defendant held the shares as nominee of Earl and Merritt. By the 36th section of "The Companies Clauses Consolidation Act," 8 & 9 Vict. c. 16, the shareholders are in a certain event made liable for the debts of the Company, and the representation that the defendant should incur no responsibility cannot be understood as meaning that the parties intended to set aside the statute. Then its meaning must be that Earl and Merritt would indemnify the defendant against loss. Now in this plea there is no allegation that Earl and Merritt have not indemnified the defendant; it may be that he has assets of theirs in his hands sufficient to satisfy the whole amount which may be recovered against him.

Judgment for the plaintiff.

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SEDGWICK v. DANIELL.

May 29.

DECLARATION for money paid by the plaintiff for the use of the defendant.—Plea: Never indebted.

At the trial, before *Watson, B.*, at the London sittings in last Easter Term, the following facts appeared.—The plaintiff and defendant were shareholders in a Joint Stock Mining Company, called “The Camborne Consols Mining Company.” Money being required for working the mine, one Tindal, who was also a shareholder in the Company, applied to the Royal British Bank for an advance of 500*l*. The Bank consented to advance the money on condition that they had, as a security, a promissory note with three makers. The plaintiff and Tindal agreed to sign the note, and they applied to the defendant to become the third maker, promising him (as the defendant alleged) that he should not be called upon to pay it. A joint and several promissory note was accordingly given with the three names, and the money received from the Bank was applied to the purposes of the mine. It was arranged that the note should be paid, when due, out of the produce of the mine; but it proved unproductive. The note was renewed, and the plaintiff and Tindal subsequently paid the amount, and this action was brought by the plaintiff to recover what he had paid above his share.

It was submitted on behalf of the defendant that this was a partnership transaction, in respect of which no action at law could be maintained. The learned Judge left it to the jury to say whether the defendant became a party to the note on the understanding that he was not to be liable, and the jury found that question in the negative. His Lordship

The plaintiff and defendant were shareholders in a Joint Stock Mining Company. Money being required to work the mine, T., who was also a shareholder, applied to a bank for an advance of 500*l*., which they consented to make on the security of the joint promissory note of the plaintiff, defendant, and T. The note was given and the money advanced, and applied to the purposes of the mine. The plaintiff having been compelled to pay more than his share of the note sued the defendant for contribution.—*Held*, that this was not a partnership transaction, and therefore that the action was maintainable.

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then directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him, if the Court should be of opinion that the action was not maintainable.

Stammers, in the same Term (May 6), obtained a rule nisi accordingly, and also for a new trial on the ground that the verdict was against the evidence.

Creasy now shewed cause.—The action is maintainable. This was an independent transaction not connected with the profit and loss of the Company. The three persons executed an instrument by which each and all became liable to pay a certain sum of money, and one having paid the whole amount, he has a right of action against the others for contribution. In *Edger v. Knapp (a)*, four persons who had acted as directors of a proposed railway Company, being sued for debts contracted on account of the concern, jointly retained an attorney to defend them on their personal responsibility; and it was held that one of the four who had paid the attorney's bill was entitled to sue the others for contribution. There *Cresswell, J.*, in the course of the argument, said, "If four individuals make a contract which in its result necessarily involves a liability on each and all of them to pay money, does not each of them give the others authority to pay it on his behalf?" On the same principle it has been held that a part owner of a ship, who, as ship's husband, incurs the expense of the outfit, may sue the other part owners separately for their respective shares of the expense: *Helme v. Smith (b)*. There *Park, J.*, said, "Even in an ordinary partnership, if one of five or six were to advance to each of the others his share of the capital as a loan, he would be entitled to sue him separately; and why not the plaintiff for money

(a) 6 Scott N. R. 707, 712.

(b) 7 Bing. 709.

he has laid out on the ship?" So here, the money borrowed on the security of the promissory note never became an item in the partnership account, but was a distinct loan by the three shareholders to the Company.—He also argued that the verdict was not against the evidence.

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Stammers, in support of the rule.—The plaintiff and defendant were partners in a Mining Company, and such a Company is subject to all the incidents of an ordinary trading partnership: *Crawshaw v. Maule* (a), *Jefferys v. Smith* (b). One of these incidents is, that one partner cannot sue another at law for a matter relating to the partnership. In *Story on Partnership*, sect. 219, p. 319, it is said, "It is sometimes laid down by elementary writers, that during the continuance of the partnership, an action at law will lie by one partner against the others for monies advanced, or paid, or contributed, on account of the partnership, or of the debts and obligations incurred thereby. But this doctrine, in the general terms in which it is laid down, is utterly untenable and inconsistent with the rights and duties, and relations of the partners with each other." Also in *Collyer on Partnership*, p. 190, 2nd ed., it is said, "Upon the whole, it may now be considered to be the better opinion, that in cases of general trading partnership, one partner cannot, at law, enforce contribution from his copartner for monies laid out on the partnership account." *Hobnes v. Higgins* (c) and *Bovill v. Hammond* (d) are authorities to the same effect. In *Robson v. Curtis* (e), the plaintiff had indorsed to the defendant a bill of exchange, which the former received from the drawer in payment for some cattle sold to him by the plaintiff and defendant, who

(a) 1 Swans. 523.

(d) 6 B. & C. 149.

(b) 1 Jac. & W. 296.

(e) 1 Stark. 78.

(c) 1 B. & C. 74.

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were in the habit of jointly purchasing lots of cattle from the breeders, and selling them in smaller parcels. The defendant indorsed over the bill, and it having been dishonoured, he promised that if the plaintiff would take it up, he, the defendant, would pay him half the amount. The defendant having failed to do so, the plaintiff sued him for money paid; but Lord *Ellenborough* ruled, that as some of the cattle remained unsold, and no account had been settled between the plaintiff and defendant, this transaction was not taken out of the partnership account, and he nonsuited the plaintiff. That was a stronger case than the present, inasmuch as there was an express promise to pay. [*Martin*, B.—That decision is not approved of in *Collyer on Partnership*, p. 181, 2nd ed.] The reasons for the rule are given by Lord *Cottenham* in *Richardson v. The Bank of England* (a). But, indeed, the rule is founded upon a maxim as ancient as any part of the common law, “*Frustrà peteret quod mox restitutus esset*,” a maxim which was acted on in a case where a villein sought to recover damages against his lord: *Jenk. Cent.*, p. 256, pl. 49. The rule of law applies, à fortiori, where one partner sues another for contribution: *Sadler v. Nixon* (b).—He also argued that the verdict was against evidence.

POLLOCK, C. B.—Two questions have been argued; one of law and the other of fact. The question of law is, whether, under the circumstances, this claim can be considered as a partnership debt, for if so no action at law can be maintained in respect of it. I am of opinion that the instrument not being signed by all the members of the Company but by three only, this must be considered as a transaction separate and apart from the partnership. With respect to the question of fact, viz., whether the verdict

(a) 4 Myl. & C. 165, 172.

(b) 5 B. & Adol. 936.

is against the evidence, I am of opinion that there ought to be a new trial.

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MARTIN, B.—I am of the same opinion. There is no doubt about the law in cases of this kind. If three partners agree that each shall bring into the concern 500*l.*, that becomes a part of the partnership property; and no action can be maintained in respect of the money brought in by each; for it would be useless for one partner to recover, when, upon taking a general account amongst all the partners, he might be liable to refund. But in this case the transaction is altogether separate from the partnership. Three shareholders agree to become security for money advanced to the Company, and which ultimately they are liable to pay. Then they ought to be in the same condition as if each had himself advanced to the Company an aliquot portion of the money. If each had done so, he might have recovered against the Company the money so advanced. Then the three being liable to pay, the plaintiff, who has paid more than his share, may maintain an action against the defendant for contribution.—As to the other point, I agree that there ought to be a new trial.

BRAMWELL, B.—Upon the matter of law I subscribe to Mr. *Creasy's* argument. If a partner advances money on account of the partnership, he cannot recover it in an action against his copartners, for the law will not imply a promise to pay it; and why? because at the time he made the advance he impliedly undertook that it should remain until an account was taken. But if two or three members of a partnership, not being the whole, think fit to enter into a separate obligation to a third party, upon the security of which he advances money to the partnership, each being liable to pay the whole, and bound to indemnify the others against the payment of more than his share, that cannot be

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considered as a partnership transaction. Here, so soon as the Bank advanced the 500*l.* to the Company, each of the three parties was entitled to take credit, as against his co-surety, to the extent of one third of 500*l.* Then one of them, having been compelled to pay more than his share, has a right to call upon the others to contribute.

WATSON, B.—I am of the same opinion.

Rule absolute (a).

(a) The cause was tried a present Term, when the jury second time before *Martin*, B., found a verdict for the defendant at the London sittings after the on the question of fact.

May 26.

DE LA RUE and Others v. FORTESCUE and Others.

An injunction had been obtained restraining the defendants from carrying on certain works so as to be a nuisance to the plaintiffs. Upon a motion for the costs of a rule for an attachment for a breach of it.—*Held*, that the injunction was a continuing injunction, and that it was not necessary to reserve to the plaintiffs leave to renew the motion for an attachment in case of any future breach.

THE defendants carried on business as the Aldershot and Shorncliffe Manure Company. An injunction had been obtained to restrain the defendants from carrying on their works so as to be a nuisance to the plaintiffs. A motion for an attachment, for disobedience of the injunction, was subsequently made, against which cause was shewn, and eventually a rule was made absolute referring the matters in dispute to an arbitrator, who was to regulate from time to time, under the authority of the Court, what was to be done by the defendants for the purpose of preventing any nuisance or annoyance to the plaintiffs, by the carrying on the defendants' works; the question of costs to be reserved until after hearing the arbitrator's report. The arbitrator made a report, dated May 1857, the conclusion of which was as follows; "that there had been occasionally, since the date of the injunction, offensive smells perceptible at the house of the plaintiffs, which would in law amount to a nuisance: that since the original complaint there had

been a great diminution of the offensive character of the works: that to carry on the works without occasioning any nuisance to the plaintiffs would require constant and vigilant superintendence on the part of the defendants; and that any neglect of the precautions would produce a recurrence of the evil."

Shee, Serjt., then obtained a rule calling on the defendants "to shew cause why they should not pay the costs of the motion for an attachment, and of all subsequent proceedings, including the costs of scientific witnesses, and report, &c.; liberty being reserved to the plaintiffs to renew the motion to the Court or to a Judge at Chambers in Vacation, in case the directions of the arbitrator already made, and to be made, should not be obeyed or should prove ineffectual."

Sir *F. Thesiger* and *Tompson Chitty* now shewed cause.—The plaintiffs ought not to be at liberty to renew the application. The injunction depends on the proceedings in the action. If a new subject of complaint should arise there must be a new action. [*Pollock*, C. B.—That is not so. The plaintiff by his action establishes the existence of a particular right, and when that is once ascertained the Court will compel the defendant to abstain from interfering with it. By the 82nd section of the Common Law Procedure Act, 1854, the injunction is "to restrain the defendants from the repetition or continuance of the wrongful act or breach of contract complained of; or the committal of any breach of contract or injury of a like kind relating to the same property or right." *Bramwell*, B.—Perhaps it is better that this clause should not stand as part of the rule; lest in future it should be supposed that, unless it has been provided for by the rule, the plaintiff has no power to apply to the Court a second time.]

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Shoe and Hawkins appeared in support of the rule.

MARTIN, B.—We are all of opinion that the injunction is in itself a continuing injunction. By the 82nd section, if it is disobeyed at any time, the plaintiff may apply to the Court or, if the Court be not sitting, to a Judge, to enforce it by attachment.

Per CURIAM.—The rule must be absolute for the costs.

Rule absolute.

BEALE, Public Officer, &c., v. CADDICK and HARTLAND.

H. and C., who carried on business in partnership, were indebted to R. their banker, to the amount, as admitted by H., of 979*l*. In 1851 R., with the concurrence of H., transferred his business to the M. Bank,

DECLARATION by the plaintiff, as registered public officer of the Midland Banking Company, for money due from the defendants to the Company, for money lent, money paid, and interest, and on an account stated.

Pleas, by the defendant Caddick.—First: Never indebted.—Secondly: Payment.—Thirdly: Set-off for money received by the Company to the use of the defendant: upon which issues were joined.

including the account in question. The partnership account of H. and C. with the M. Bank commenced with this item of 979*l*., and continued open for a considerable time, during which H. paid in monies to an amount exceeding the sum of 979*l*. The pass book was regularly sent to H. The deed transferring the business from R. to the M. Bank, contained a provision, "That at the expiration of twelve months, as to such accounts as should not be taken to by the M. Bank, the M. Bank should, during a period not exceeding ten years, either accept or compel payment, or permit the same to remain due, and should be possessed of all monies paid in discharge of such accounts in trust for R." In 1852, the M. Bank gave notice to R. that they would not take to this amount. An action having been subsequently brought by the M. Bank against H. and C. to recover the balance due, *Held*:—First, that H. had power to bind his partner by assenting to the transfer of the debt on the account. Secondly, that the debt of 979*l*. was extinguished by the payments subsequently made by H. to the credit of the partnership account and the assent to the appropriation to be inferred from H. not objecting to the pass book; and that after such extinguishment, as between the M. Bank and the partnership, this account could not be treated as an existing debt remaining due to R.

Quære: Whether C. could have been bound by H. assenting to the sum of 979*l*. as the balance of the account due to R., if it had not been the balance really due.

The defendant, Hartland, allowed judgment to go by default.

The particulars of the plaintiff's demand were for monies paid to or for the defendants, between the 23rd of August, 1851, and the 20th of December, 1852, and subsequent interest, amounting to 1059*l.* 17*s.* 9*d.*

The particulars of set-off were for monies paid into the bank between the 9th of August, 1851, and the 25th of March, 1852, amounting to 1164*l.* 11*s.* 3*d.*

At the trial before *Crowder, J.*, at the Spring Assizes for the county of Stafford, it appeared that for a considerable period, previously to and including the 2nd August, 1851, the defendants, who were partners in a colliery at Titford, carrying on business under the name of "Haynes and Hartland," kept their banking account with a Mr. Robins, a banker, carrying on business under the name of the Stourbridge Old Bank. On the 4th of August, 1851, Robins, by indenture, assigned his banking business, and all debts due to him upon active, overdrawn accounts, &c., to the Midland Banking Company; upon trust that the said Banking Company should, for the space of twelve calendar months then next following, either accept or compel payment from the persons respectively liable to pay the same, of the whole or any part of the principal monies and interest due; or in case payment should not be tendered or enforced, to permit the same sums, or any part thereof, to continue due to an amount respectively equal to the respective sums, &c.; and to stand possessed of all monies paid during such period of twelve months in discharge of principal and interest upon such overdrawn accounts as should be in the whole or in part paid off, in trust for the said Banking Company; and after the expiration of twelve months, as to such of the debts as the said Banking Company should declare their option of taking, for the use of the said Banking Company; and as to such as should not be taken by or on behalf of the Company under their

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option; in trust that the Company should during such period, not exceeding in the whole the period of ten years, as Robins should require, by and with and out of the funds of the Banking Company, but at the discretion of Robins, either accept or compel payment of the said debts, or permit the same, or any part thereof, to continue due; but so that Robins should not be entitled to require the Banking Company to make any further advances, and should be possessed of all monies paid during such period, not exceeding ten years, in discharge of the last mentioned accounts, in trust for Robins. One of the accounts so transferred was that of "Haynes and Hartland." This was done with the assent of Hartland, and it did not appear that Caddick had objected to it, though he had heard that the account had been transferred. At this time the defendants were indebted to Robins on their banking account, to an amount as claimed by Robins, and admitted by Hartland, of 979*l*, and when the account was so transferred, the first item in the books of the Midland Banking Company, and in the pass book of the firm, was the sum of 979*l* appearing as a balance against the defendants. The defendants continued to keep their account with the Midland Banking Company, paying in monies week by week to an amount which considerably exceeded the balance so transferred. Until the end of 1852, Hartland, who was the active partner, attended at the bank every week with the pass book. Caddick lived at a distance: he did not interfere personally, but there was evidence that he knew that Hartland attended at the bank. Caddick, however, denied that he knew that the balance was transferred till 1854. On the 15th of September and on the 15th of October, 1853, Hargreave, the manager of the Stourbridge Branch of the Midland Bank, wrote to "Haynes and Hartland" stating that it was "the wish of Robins that the old accounts should be got in."

The following letter was afterwards written by Robins's solicitor to the defendant's attorneys:—

"Stourbridge,

4th Nov. 1856.

"Dear Sirs,

"If the amount due from Messrs. Haynes & Hartland to the Stourbridge Old Bank be not immediately paid, I have received instructions to proceed for its recovery.

"Messrs. Emmett & Son,

"I am, &c.,

"Bloomsbury Square.

HENRY CORSER."

In answer to interrogatories, Hargreave stated, "that the deed contained provisions under which certain accounts thereby assigned were to be worked under the guarantee of Mr. Robins, and the account of "Haynes and Hartland" was one which fell within the meaning of such provisions: that the firm of Haynes and Hartland had been debited with the balance owing by them to Robins: that the Banking Company had given credit to Robins for that amount, and that this was the only mode in which it appeared that the balance of 979*l*. was satisfied or discharged by the Banking Company to Robins."

On behalf of the defendant Caddick, it was contended, first: that the balance of 979*l*., alleged to be due to Robins, was not the true balance due from the firm, and that Hartland, not having express authority as a partner, had no implied authority to assent to this item being carried to the account of the firm. Secondly, that this sum of 979*l*. was always treated as due to Robins, as appeared by the above letter.

The learned Judge told the jury that the pass book having been in the usual way passing from the bank to Hartland, from time to time, for several years without any objection being made to the 979*l*. being taken into account, and payments having been made on the credit side in the usual way without any objection, such payments disposed of the items on the other side of the account; and he asked them

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whether they thought, that by the consent of Caddick and Robins that balance was taken into the account. His Lordship said that it did not make any difference whether Caddick knew of it or not; that if a pass book is sent to one partner at a given time, the other partner cannot say he is not bound, because he does not choose to look at it. If he had objected it would have been a different matter. As it was, if there was an assent by the partner to whom the pass book was sent, that was an assent by the partnership. The jury found a verdict for the plaintiff for the amount claimed, after deducting one of the items of which the sum of 979*l.* was made up, which appeared not to have been due to Robins at the time of the transfer of the account.

A rule nisi for a new trial had been obtained, on the ground that the learned Judge misdirected the jury in only leaving to them the question of Hartland's assent to the pass book, and not giving effect to the rejection of the balance conditionally transferred, or leaving to the jury any question of appropriation.

Whateley and *Gray* shewed cause (a).—The first question is, whether, under the circumstances, Hartland had authority to consent to the transfer of the account. It is scarcely necessary to cite any authority to shew that Caddick was bound by the act of Hartland in assenting to the transfer. Suppose two partners, one being a dormant partner, keep an account with a firm of bankers, and after such account has been kept some time there should be a change in the firm of bankers, could the sleeping partner deny his liability upon the banking account, because he did not know of the change in the firm? In *Lacy v. M'Neile* (b), the defendant who carried on business in partnership, being indebted to G., G.

(a) May 30 and June 4.

(b) 4 D. & R. 7.

assigned the debt to the plaintiff; notice of the assignment was sent to Pizey, one of the defendants, who afterwards promised to pay the debt to the plaintiff, and it was held that this promise bound his partners. Secondly, the 979*l.* was entirely liquidated by the sums paid in week by week, amounting to a sum exceeding this amount; and it so appears on the face of the pass book, which was seen and assented to by Hartland, who, as a partner, had authority for that purpose. Then it will be urged that the Banking Company did not take to this account, and that if at the end of ten years the sum of 979*l.* was not paid, Robins was to pay it; and, therefore, that this debt having been rejected by the Midland Bank was due not to them but to Robins. [*Bramwell*, B.—I should understand that, so far as customers are concerned, the Banking Company took to the accounts at once. They could not make a fluctuating arrangement that the debts on overdrawn accounts should be due to the bank at one time and to some one else at a future time, though it may have been a different matter as between the Banking Company and Robins. *Martin*, B.—On the 25th of March, 1852, the sums which had been paid by the partnership to the credit side of the account exceeded 979*l.*; what is meant by a rejection of the account after that?] The relation of banker and customer was fully established between the Midland Banking Company and the defendants. Looking at the deed, it is clear that the rejection of the account was nothing but a matter of private arrangement between the two banks with which the customers have nothing to do.

The Solicitor General and Phipson, in support of the rule.—The question left to the jury was whether Hartland assented to the account appearing in the pass book. It is not contended that if A., B. and C. meet, C. may not agree that a debt

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due from him to B. shall be transferred to A. But this was not a transaction in the ordinary way of business; it was a transfer which gave the transferee a right to retransfer the account, and the account was in fact rejected and retransferred to Robins. That is not a transaction in which one partner would have power to bind his copartners.—Secondly, the balance of 979*l.*, alleged by Robins to be due, was not the true balance. Caddick had a right to say that he owed much less, but he would be deprived of that right if he could be bound by Hartland's assent to the pass book. [*Pollock, C. B.*—Caddick had a right to be in the same position as regards the Midland Banking Company as he would have been with regard to Robins. *Martin, B.*—That seems undisputed. If Hartland assented to a balance that was not due, it may be said that there was no consideration for such assent. *Pollock, C. B.*—Caddick might have given evidence, that at the time of the transfer of the account nothing was due from the firm to Robins. If the learned judge had refused to admit such evidence, we should have granted a new trial.]—Thirdly, the old balance was never in fact paid off. The letter from Robins's solicitor and Hargreave's evidence shewed that Robins was always treated as the owner of the balance whatever it was.—(*Whateley* referred to *Bodenham v. Purchas* (a).)

Cur. adv. vult.

POLLOCK, C. B., now said.—We are all of opinion that this rule ought to be discharged. The account was transferred from a person of the name of Robins to the Midland Banking Company, represented by the plaintiff Beale, their public officer, and if in reality, in consequence of the transfer, there had been a loss to Caddick, it may be that

(a) 2 B. & Ald. 39.

he would have had a right to complain, and say "I am not liable at all; at all events, I am not liable to that which is claimed." But it was said that the learned Judge ruled that it was sufficient if Hartland consented, and there was no occasion to inquire anything about Caddick. There are circumstances under which that would not have been a correct mode of leaving it to the jury; but the learned Judge's direction must be taken with reference to the subject-matter before him. The defendant Caddick really had the benefit of everything to which he would have been entitled as against Robins, and those expressions to which exception was taken at the trial, and afterwards before us, when moving for a new trial, were with reference to the facts perfectly correct. For these reasons I am of opinion that the rule ought to be discharged.

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MARTIN, B.—I am of also of opinion that the rule ought to be discharged. The first question is with respect to the transfer of the sum of 979*l*. Now if the learned Judge had told the jury, (what at one time in the course of the argument I thought likely to be the case), that the Banking Company represented by the plaintiff had any better right with respect to that sum of money than Robins had, I should have been of opinion that that was a misdirection; for it seems to me, that on a transfer of an account, at the very utmost, the party taking it must take it precisely as it is, that is to say, the actual debt due and not any particular balance that may have been so transferred. The learned Judge adopted what seems to me the proper view of the subject, viz., that this action must be considered as the action of Robins, and the jury must have looked upon it in that light. It may be, that if Hartland had borrowed money from the Banking Company, and had paid off Robins with the money so borrowed, he would have had authority as a partner to pledge the credit of Caddick.

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In point of fact he did not do that. With respect to the appropriation, it appears to me the argument on behalf of the defendant Caddick fails. I assume, so far as Robins and the Midland Banking Company were concerned, that they did reject the 979*L*, and keep a separate account of it. But I apprehend, that unless Hartland was a party to that arrangement, the entry in the pass book after the payment of the money by him was a conclusive appropriation of that money as against the 979*L*; for it is the person who pays the money who has a right to give a destination to it. Therefore when Hartland received the pass book, and saw the money from time to time paid by him, appropriated or entered in that book, he had a right to appropriate the money as, against the first item, and except with his consent, that money could not afterwards be appropriated otherwise; and therefore it seems to me, that without going into the question whether or not Caddick consented to the transfer, if the pass book, as it would do, stated that 979*L* was paid, no action could be maintained in respect of it, because it was paid. Mr. *Phipson* fails to shew that Hartland was any party to the taking of this 979*L* out of the account and putting it into a separate account as between Robins and the Midland Banking Company. There having been no such consent on Hartland's part, the items in the pass book must be taken as applying to and extinguishing the earlier item, viz., the 979*L*.

BRAMWELL, B.—I am of the same opinion. I take the case to be this. The Midland Banking Company says, "We have paid a certain quantity of money on your account:" the defendant Caddick answers, "So be it, but we have paid you an equivalent sum of money." And the question is, whether that is true. It would be true if the plaintiffs have no right to charge the 979*L*, or the actual sum due in respect to the item, as to which the

charge is made. Then the subsequent question between the parties is, aye or no, had the Banking Company a right to charge that item (I for the moment leave out the figures), let its amount be what it might, against the defendants? I am clearly of opinion that they had, because the transaction appears to me to have been shortly this,—the firm of the defendants were indebted to Robins in a balance; then that balance, or what is supposed to represent that balance, is debited to the defendants in an account opened between them and the Midland Banking Company. If the defendants had agreed to that, it would have been the common case of a debt due from A. to B., being transferred to C., with the consent of A. In this case it did not appear that Caddick had actually agreed, but Hartland having agreed that agreement was binding on Caddick. Caddick says, “Although my partner agreed to this, inasmuch as I did not, I am not liable, and the transaction is invalid as against me.” On the other hand, the Midland Banking Company say, “Your partner is competent to bind you on that matter.” It was urged on behalf of Caddick, that as between Caddick and Robins the account was disputed; and that therefore Caddick had a right to say, “You have no right to put me in a worse situation against my new creditor, than against my old one.” But the answer to that is, that inasmuch as the Midland Banking Company did not know of the dispute as to the account, they cannot be affected by that consideration, because it is perfectly manifest that Hartland, as a partner, if he liked, might have drawn a cheque on them for the amount in question, and have paid it to Robins; and if Hartland has done what is equivalent to that, between him and the Midland Banking Company, which in my opinion he has, it cannot matter what the state of account is between Robins and the defendants,

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because even if there had not been a shilling due from the defendants to Robins, still if Hartland had gone to the Bank and said, "There is 979*l*. due, and that I want you to lend me and my partner, in order that we may pay Robins," it is clear that the partnership would have been bound. Therefore it seems to me of no moment whether there was a debt due from the defendants to Robins, supposing that the Midland Banking Company acted *bonâ fide* in their dealings with Hartland. That remark, however, is to be qualified in this way. I say, if Hartland had specifically agreed to the sum of 979*l*., in my opinion the defendant Caddick would have been bound, although that was not the true balance due; but the more rational way of looking at the transaction is to say, not that Hartland bound himself to that particular amount, but only to the true balance, which was supposed to be 979*l*.; in other words the balance, whatever it was. In that case I think it was perfectly competent to the defendants to say, "It may be that you, the Banking Company, have credited Robins 979*l*.—it may be that Robins has credited us with 979*l*., but we did not owe the money to him, and you ought not therefore to have credited him with the amount; and the result is, that you must alter the amount of the credit so given to him, and charged against us." That is the reasonable way of looking at it, and all the difficulty arises from its being supposed that the learned Judge said, that the 979*l*. was a binding item. I do not think he did. It is clear that he said the contrary (as my brother *Martin* observed), because he allowed the defendants an item out of it. Upon that ground, therefore, it seems to me it may not be important to look at the particular words he used. If I am right on this point the question of appropriation does not arise, because if the defendants owe to the Banking Company the true balance which they owed

to Robins before, the balance added to the other items of the account overtops the cross payments. However, it seems clear that Hartland must be taken to have agreed that the first payment he made into the account should go in discharge of the first item. On these grounds I think that the learned Judge was clearly right, and that the rule must, therefore, be discharged.

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WATSON, B—I am of the same opinion. The facts appeared to be a little complicated at first, but when they were clearly brought before us by Mr. *Whateley* and Mr. *Gray*, there was no doubt on the subject. The objection to the direction of the learned Judge was, that he told the jury that it was immaterial whether Caddick had assented to the transfer of the account, as Hartland had the power to bind him. Now, I take it to be perfectly clear that one partner has the power of employing a banker; and when that banker ceases to carry on business, as here Robins ceased to carry on business, he has the power to employ another banker, as in this case Hartland employed the Midland Banking Company, and transferred the account to them. Then, the objection is this,—that Hartland still had no power to bind his copartner Caddick to the identical sum of 979*l*. But that is not what the learned Judge told the jury. He put it to them in this way: that the account was transferred by Hartland, and that it was equally open to Caddick to contest the amount of the balance in an action by the present plaintiff, as it would have been in an action by Robins. It is perfectly clear, that the learned Judge stated that the promise made by Hartland was not to pay 979*l*, but the balance, whatever that might be, and that is within the principle that one partner has the power to bind another in every thing connected with the partnership transactions. Whether or not he

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could have bound him conclusively by assenting to the 979*l.* as an ascertained balance, is a point upon which I do not wish to express any opinion whatever. On the other hand *Lacy v. M^rNeile* (a) is a conclusive authority that he had a right to bind him by transferring what might be found to be the balance.—Then as to the appropriation,—there is abundant evidence of appropriation, because the 979*l.* is carried as the first item to the new account. A great deal was said about the power of the Banking Company to repudiate this and other accounts if they did not prove advantageous. But when the matter is looked into it is perfectly clear that the transaction between Robins and the Banking Company was, that the latter was to take Robins' business and all the accounts, and to have the option to continue or repudiate any account at the end of twelve months, and then at the end of ten years Robins was to guarantee them against any loss on an account so repudiated. The account became an account between the Midland Banking Company and the defendants, and although as between the Banking Company and Robins the Banking Company repudiated the account, it still continued a debt due from the defendants to the Banking Company. It was an account standing in the books of the Midland Banking Company in the names of Hartland and Caddick, and then at the end of ten years, if the Midland Banking Company did repudiate the account, Robins was to guarantee them against any loss upon it. For these reasons it seems to me that the rule must be discharged.

Rule discharged.

(a) 4 D. & R. 7.

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THE ATTORNEY GENERAL v. JOHN HIGGINS and Others.

May 30.

THIS was an information against the defendants who were executors of William Higgins deceased, for not exhibiting an inventory duly stamped, of certain shares in Railway Companies in Scotland, pursuant to the 48 G. 3, c. 139, s. 38.

Plea: The general issue.

A special verdict was found by consent, which stated that William Higgins, before and at the time of making his will, and thence until his death, resided and inhabited, and was domiciled at Broughton, within the province of York, and after the 31st of August, 1805, on the 1st day of January, 1850, within the province aforesaid, duly made his will signed by him &c. and attested &c. according to the form of the statute, and thereby appointed the said John Higgins and others executors, and gave to his executors all his personal estate and effects in the United Kingdom of Great Britain and Ireland: and that William Higgins afterwards, and after the passing of "The Companies Clauses Consolidation (*Scotland*) Act, 1845," on the 7th of December, 1853, within the province aforesaid, died without having in anywise altered or revoked his will: and that the will of William Higgins was a good and valid

A testator, domiciled in England, having died in the province of York, his property within that province was sworn under 100,000*l.*, and the will having been proved, probate duty was paid on that amount. The testator's personal property actually in that province amounted to 93,221*l.*, in addition to which he was possessed of shares in railway Companies in Scotland, (such Companies being constituted under the Companies Clauses Consolidation (*Scotland*) Act, 1845), to the value of 5715*l.* In pursuance of the 19th and 20th sections of that Act the executors

produced the probate with the proper declaration to the secretaries of the several railway Companies, and caused their own names to be inserted in the register of shareholders at the chief offices of the said Companies in Scotland; but, although more than six months had elapsed, did not exhibit an inventory properly stamped in the Commissary Court in Scotland, as required by the 48 Geo. 3, c. 149, s. 38. In an information for penalties for not exhibiting such inventory,—*Held*, that the duty imposed on executors by the 49 Geo. 3, c. 149, s. 38, to exhibit in the Court of Scotland an inventory properly stamped, is not affected by the 8 & 9 Vict. c. 17, s. 20, and that therefore the duty on such inventory was payable in Scotland in respect of the shares.

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will and disposition, according to the laws and customs of Scotland, of all the said testator's personal and moveable estate and effects at the time of his death in that part of the United Kingdom: that John Higgins and others as executors, after the death of William Higgins, on the 12th of January, 1854, duly proved the will in the Prerogative Court of the province of York, and probate was then granted to John Higgins and others; and the said John Higgins and others thereupon then took upon themselves the burthen of the execution of the will as executors, and afterwards, and within six calendar months after obtaining probate, that is to say on the 1st of March, 1854, produced the probate to the several and respective secretaries of certain Railway Companies in Scotland, all which several Companies had been incorporated by Acts of Parliament, with which "the Companies Clauses Consolidation (*Scotland*) Act, 1845," was incorporated, and which were respectively called the Edinburgh and Glasgow Railway Company, &c., in all which said several Companies the said William Higgins deceased, before and at the time of his death, was entitled to and was the owner of certain shares of and in the respective capitals thereof: and at the same time produced to and left with the said several and respective secretaries a declaration in writing duly made in conformity with and in pursuance of the provisions of "the Companies Clauses Consolidation (*Scotland*) Act, 1845," and thereupon then, as executors, caused the said shares to be duly transferred and transmitted in the manner required by "the Companies Clauses Consolidation (*Scotland*) Act, 1845," in the registers of shareholders of the said several Railway Companies respectively, at the several chief offices of the said several Companies, situate and being respectively in Scotland, from the name of the said testator William Higgins into the names of them the

said John Higgins and others, and thereby and not otherwise entered upon the possession and management of the said shares, the same being the only personal and moveable estate and effects in Scotland of the said testator. And that the period of six calendar months from the time of such transfer and transmission being made, and from the time of the said John Higgins and others assuming the possession and management of the said shares as such executors as aforesaid elapsed before the day of exhibiting the said information; and that the certificates of the proprietorship of the said shares, duly issued in pursuance of the said Acts of Parliament whereby the said Railway Companies had been incorporated, before and at the time of the death of William Higgins were within the province of York; and each of them, the said John Higgins and others, had during all the time aforesaid notice of the premises, but have not nor has either of them exhibited in Scotland a full and true inventory duly stamped, or any inventory of the said shares, but have, and each of them has, neglected and refused so to do. And that the said shares at the time of the death of William Higgins, and from thence continually until the transfer thereof as aforesaid, and during and until the expiration of six calendar months &c., were in the whole of a value exceeding 5000*l.* and under the value of 6000*l.*, that is to say, of the value of 5715*l.* 2*s.* 6*d.*, and that the stamp duty which would have been payable upon and in respect of the inventory of the said shares in Scotland, if such inventory ought by law to have been and had been exhibited by the said John Higgins and others as such executors, was and is the sum of 100*l.* That the said William Higgins at the time of his death was possessed of goods and chattels within each of the provinces of Canterbury and York in England; and that the said John Higgins and others after the death of

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the said William Higgins, and after the obtaining of probate as aforesaid, and before the expiration of six calendar months from the time of their assuming the possession and management of the said shares, took upon themselves the execution of the said will, and after probate had been so aforesaid granted by the Prerogative Court of York, probate of the said will was on the 27th of January, 1854, duly granted to them as such executors as aforesaid by the Prerogative Court of Canterbury, for and in respect of the goods and chattels of the testator being within the said last mentioned province. And that the goods and chattels of the testator in the province of Canterbury, and in respect whereof probate was so granted by the said Prerogative Court of Canterbury as aforesaid, were at the time of his death, and from thence until and at the time of the granting of the probate thereof as aforesaid of a value exceeding 35,000*L.*, and under the value of 40,000*L.*, that is to say of the value of 39,790*L.* 1*s.* 11*d.*; and that the stamp duty payable in respect thereof, that is to say the sum of 525*L.*, was duly paid to Her Majesty by the said John Higgins and others, as executors. And that the goods and chattels of the said testator in the province of York, and in respect whereof probate was so granted as aforesaid by the said Prerogative Court of York, were at the time of the death of the said testator and from thence until and at the time of the granting of the probate thereof as aforesaid, of a value exceeding 90,000*L.*, and under the value of 100,000*L.*, that is to say of the value of 93,221*L.* 3*s.* 5*d.*: And that the stamp duty payable in respect thereof, that is to say 1350*L.* was duly paid to Her Majesty by the said John Higgins and others, as executors. And the jurors further found, that if the said shares of the said testator in the said Railway Companies in Scotland actually had been, at the time of the death of the testator, or if those shares

were to be considered as being goods and chattels of the said testator within the province of York, the value of those shares, added to the other goods and chattels of the said testator within the province of York, would have been under the value of 100,000*l.*, and that no more stamp duty would have been due or payable to Her Majesty in respect of the probate thereof than has actually been paid by the said John Higgins and others as such executors. But whether or not upon the whole matter &c., the said John Higgins and others ought to have exhibited such an inventory as aforesaid, and whether they do owe or are liable to pay to Her Majesty double the stamp duty which would have been payable upon such inventory, in manner and form as in the said information is alleged, the jurors are ignorant &c.; and if upon the whole matter it shall appear that the said John Higgins and others ought to have exhibited such inventory and do owe &c., the jurors say that the said John Higgins and others ought to have exhibited such inventory, and do owe &c. double the stamp duty which would have been payable thereupon, that is to say, the sum of 200*l.* as in the information alleged. But if upon the whole matter &c. the said John Higgins and others ought not to have exhibited such inventory, do not owe or are liable to pay double the stamp duty &c., then the jurors say that the said John Higgins and others ought not to have exhibited such inventory, and that they do not owe nor are liable to pay double the stamp duty &c.

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The Attorney General (with whom was *Pigott*, Serjt., and *Beavan*), for the Crown.—The question turns upon whether the Crown can claim duty in respect of shares in certain public companies in Scotland which belonged to a testator who was domiciled, and whose will has been proved in England. The 8 & 9 Vict. c. 17, s. 19, provides, that if the interest in any share have become

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transmitted in consequence of the death, &c., of any shareholder, such transmission shall be authenticated by a declaration in writing as thereafter mentioned, and such declaration shall be left with the secretary, and thereupon he shall enter the name of the person entitled under such transmission on the register of shareholders. By s. 20, "if such transmission have taken place by virtue of any testamentary instrument, or by intestacy, the probate of the will or the letters of administration, or an official extract therefrom obtained from any prerogative Court, if granted in England, or a testamentary, or testament dative^(a), if expedient in Scotland, or an official extract therefrom shall, together with such declaration, be produced to the secretary, and upon such production, in either of the cases aforesaid, the secretary shall make an entry of the declaration in the said register of transfers." It will be contended, that on the production of the probate of the will the secretary is bound to make the entry in the register of transfers, and that the title of the executors is thereby complete, and that they are enabled to dispose of the shares without taking any further steps. The effect, however, of the statute is merely this, that when a person possessed of shares in public companies in Scotland dies, if his will is proved in England, it is not necessary for the executors to prove the will again in Scotland. In Scotland wills must be confirmed. Before the passing of 4 Geo. 4, c. 97, this took place in commissary Courts which were relics of the old ecclesiastical Courts which existed before the Reformation. Since the passing of that Act confirmation takes place in the sheriffs' Courts. In England probate


(a) In Scotland an executor producing a will by which he is appointed executor, is called an executor testamentary, and the will a testament testamentary. Where there is no will appointing an executor, the Commissaries, on the application of persons interested, appoint an executor dative, and the instrument of appointment is the testament dative.

is an exemplification of an act of Court. William the Third brought from Holland the device of raising a revenue by stamps, and probate duty was levied in England by affixing a stamp on the exemplification. In Scotland the will was simply confirmed without probate, and therefore there were no means of affixing a stamp. Probate duty was introduced into Scotland in 1804, by the 44 Geo. 3, c. 98. This Act was amended in 1808, and in order to adopt the practice of affixing a stamp, the statute required that a stamp should be affixed to the inventory. By the 48 Geo. 3, c. 149, s. 38, it is enacted, "that every person who, as executor, &c., shall intronit with or enter upon the possession or management of any personal or moveable estate or effects in Scotland of any person dying after the 10th day of October, 1808, shall, on or before disposing of or distributing any part of such estate or effects, or uplifting any debt due to the deceased, and at all events within six calendar months next after having assumed such possession or management, in whole or in part, and before any person shall be confirmed executor testamentary or dative, exhibit upon oath or solemn affirmation in the proper commissary Court in Scotland, a full and true inventory, duly stamped, &c., of all the personal estate, &c., distinguishing what shall be situated in Scotland, and what elsewhere, together with any testament, &c., which inventory, together with such testament or other writing, if any such there be, shall be recorded &c., and in case any person hereby required to exhibit any such inventory &c. shall neglect or refuse so to do &c., he shall be charged, &c., to the payment of double the amount of the stamp duty which would have been payable upon such inventory" (a). The 20th section of the 8 & 9 Vict. c. 17, does not relieve the executor from the duty of exhibiting the inventory in Scotland, for though he may use the probate

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(a) The amount is now regulated by 55 Geo. 3, c. 184.

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to establish his title, as soon as he intromits with the shares he is bound to exhibit an inventory. For general purposes personal property has no locality, but it has a locality for the purposes of probate. If there is a provincial probate, that operates only on property within the jurisdiction of the Court which granted it. These railway shares were personal property in Scotland. They were not within the jurisdiction of the Court which granted probate in England. The legislature has relieved executors from the obligation of proving the will again in Scotland, but the executor in Scotland has another duty, he is bound to exhibit an inventory, which is a collateral act which the legislature has directed to be done for fiscal purposes. It may be argued that the probate duty paid in the province of York covers the value of these shares, but property locally situated in Scotland is not assessable to probate duty in England. The probate duty in England is payable only on property within the jurisdiction of the Courts granting such probate. If the executors have paid probate duty on property not in England, they will get it back; it must therefore be taken that the duty which was here paid was paid on property in England. The mode of obtaining confirmation by an executor appointed by will, is to produce before the sheriffs' Court the testament which contains the nomination, with a full inventory seen and confirmed, and the sheriff's authority is granted by decree of confirmation. Confirmation is necessary as an active title, *i. e.*, to enable the executor to receive and distribute the moveable estate: Bell's Principles of the Law of Scotland, ss. 1892, 1893. The 20th section of the 8 & 9 Vict. c. 17, makes it unnecessary for an executor to obtain confirmation in Scotland for the purpose of getting shares transferred into his own name. It saves an executor, who has proved a will here, from the expence of taking down the original will in the custody of an officer before the sheriff's Court, and enables

him to get a transfer of the shares without that expense, but it has no further effect.

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Manisty for the defendant.—It is admitted that before the passing of 8 & 9 Vict. c. 17, s. 20, confirmation would have been necessary. The object of the clause was to render less complicated the steps which the executors of testators, who died in England possessed of shares in Scottish companies, were obliged to take in order to entitle them to such shares. For that purpose it enables executors to acquire a title to the shares by acts done in this country. They may therefore pay probate duty here. The duty has in fact been paid in the province of York. Probate was taken in York for an amount under 100,000*l.*; it is found that the value of the testator's other property in the province of York was 93,231*l.*, and that the value of these shares was under 6000*l.* [*Pollock*, C. B.—If your view is right where should the duty be paid, in England, in Canterbury or York? *The Attorney General*—It is well settled that legacy duty is paid according to the domicile of the testator, and probate duty according to the situs of the property: *The Attorney General v. Dimond* (a), *The Attorney General v. Bouwens* (b), *In re Ewin* (c). *Pollock*, C. B.—The 8 & 9 Vict. c. 17, s. 20, enables the executor of a person entitled to shares in Scotland to prove that he is the person entitled to them in an English Court. Suppose a person possessed of such shares died leaving a small property in England, and his executor obtained probate here, he would be entitled, on production of that probate, to have his name put on the register of shareholders; but there is nothing to compel him to reveal that he had property in Railway Companies in Scotland, or to subject him to penalties if he did not pay probate duty here upon it.] The 20th section

(a) 1 C. & J. 356.

(b) 4 M. & W. 171, per *Ld. Abinger*.

(c) 1 C. & J. 151.

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of 8 & 9 Vict. c. 17, makes the shares to which it applies property "for and in respect of which the probate is taken out" within the meaning of those words in the 55 Geo. 3, c. 184, schedule. [*Pollock*, C. B.—Where do you say that the property is locally situate?] By section 7 the shares were made personal property, but it is not said where. Probably they are personal estate where the certificates are, that is to say, in the province of York. It is much the same as if a man died in England having a bond given by a person in Scotland. In such case the bond would draw to it the debt which would be bonum notabile in England. [*Martin*, B.—Is there any authority for that position? *Pollock*, C. B.—The doctrine as to the locality of a bond only applies where the debtor resides in this country. Debts due from foreigners are not the subject of probate in this country.—*The Attorney General* referred to *The Attorney General v. Hope* (a), and *The Attorney General v. Bouwens* (b).] The *Attorney General* would scarcely give up the claim of the Crown to all debts due to persons here from people residing abroad. [*Pollock*, C. B.—That may be so if dividends on such debts are payable here.]

The Attorney General, in reply.—The chief offices of these railways are in Scotland, and therefore the shares in question are personal property in Scotland: *Smith v. Stafford* (c). That being so, the duty is payable in Scotland. The 20th section of the 8 & 9 Vict. c. 17, does not repeal the 48 Geo. 3, c. 149, s. 38. It merely puts the English probate in the place of the Scotch confirmation. But the duty is a matter independent of the confirmation. As soon as the executor intermits with the property, he must exhibit the inventory and pay the duty. Unless the 48 Geo. 3, c. 149, s. 38, is repealed by the 8 & 9 Vict. c. 17, s. 20, the duty remains payable.

(a) 1 C. M. & R. 530.

Abinger, Ib. 192.

(b) 4 M. & W. 171. Per Lord

(c) 2 Wils. Ch. Ca. 166.

The object of that section is, that the will may be proved in England, leaving the duty to be paid in Scotland as before. It is impossible for an executor to pay in England the probate duty on this property which is in law situate in Scotland. The two enactments are wholly parallel, and do not interfere with each other.

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POLLOCK, C. B.—I am of opinion that the Crown is entitled to our judgment. The question turns upon what is the effect of the 20th section of the 8 & 9 Vict. c. 17. The Act is “an Act for consolidating certain provisions usually inserted in acts of parliament with respect to companies incorporated for carrying on undertakings of a public nature in Scotland;” and certainly it would be strange if in an Act of that description there was found a clause which changed the mode of administration of a certain class of property in Scotland. Mr. *Manisty* says that the effect of the 20th section is to make all property upon which this Act was intended to operate, *effects* in England, and that it becomes for the purpose of probate either property in England or property in Scotland, without any provision whatever to secure the rights of the Crown in respect of the public revenue. It is suggested that we are to perform a sort of ancillary part, as if we were members of the legislature, and are to supply all that may be necessary to give effect to this construction of the Act. But we cannot do so. We must treat this act of parliament as providing for that which is found in it and nothing more. It is intended to relieve persons who take out probate in England from the necessity of also proving the will in Scotland, if there is no other personal property in Scotland, except shares in such undertakings as the Act relates to. The proof may be either in Scotland or in England; and the question is, whether the party is not still bound, under the 38th section of the 48 Geo. 3, c. 149, to

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exhibit an inventory and give to the Crown the benefit of the stamp which is to be impressed upon it. I think that he is. In this case, if we put together the duty on the York probate and the duty on the Canterbury probate, there is enough to cover the whole of the Scotch property. But that might not have been the case. The probate duty is not made precisely a duty for every pound; but it proceeds by stages, like many other matters of revenue, as for instance the stamps upon bonds, bills of exchange, conveyances, and other instruments. Here it is said that the duty has been paid, because, if the parties were allowed to include it in the English probate, the York probate would cover it, since, adding the value of the shares to the York property, the whole would not have been more than 100,000*l*. If probate were taken out in the province of Canterbury for under 100,000*l*, there being but 90,000*l*. and a few odd pounds in Canterbury, the executor would not be entitled to take out probate in York without paying the duty on personal property in the province of York, if it happened that the York property would be covered by the duty on the Canterbury probate. The same rule applies here. The property in Scotland must pay its duty there, the property in York must pay its duty in York, and the property in Canterbury must pay its duty in Canterbury. The duty, therefore, has not been paid here. The 8 & 9 Vict. c. 17, s. 20, was really intended to give facility to transfer the shares at the office where the shares are to be transferred, and it was not intended to have the slightest effect upon either the payment of the duty, or the exhibiting the inventory, or to touch the revenue in any way.

MARTIN, B.—At first I had considerable doubt about this case, but the argument of the *Attorney General* has perfectly satisfied me. Two points were made by Mr. *Manisty*; the first was that the shares were bona notabilia

here. I apprehend that he has entirely failed in that, and that they are not. It is clear that by the 19th section of the 8 & 9 Vict. c. 17, the evidence of title to these shares is the register of shareholders, and that being in Scotland this property is located in Scotland; and considering that this act of parliament was passed in the year 1845, which is eleven years after the decision of *The Attorney General v. Hope (a)*, I have no doubt it was framed upon the basis that the law as there laid down was the acknowledged law. The probate does not affect personal property located out of England, and the probate duty does not attach upon such property. Then comes the question, what is the true construction of the 20th section of this act of parliament? A Scotch will of personalty is analogous to an English will of realty, over which a probate court has no jurisdiction. The will of itself confers the title on the devisee. The 20th section enacts, that upon the production of the testamentary, the secretary of the Company shall make an entry in the register of transfers, that the person who is entitled under that testamentary is the owner of these shares, and that the production of the probate of the will in England shall have the same effect. This section therefore does nothing more than dispense with the necessity of producing the original will, and render it sufficient to produce the English probate to the secretary of the Company; and the object was to prevent the trouble and inconvenience of taking the original will into Scotland where, if the testamentary was required to be produced, it would be incumbent to produce the will itself. Therefore it gave to the production of the English probate the same effect as to that of the testamentary. That being so, it seems perfectly obvious on looking at the 38th section of the

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(a) 1 C. M. & R. 530.

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48 Geo. 3, c. 149, that the inventory on which the stamp is to be impressed is a wholly independent matter; and that if a person claiming under a Scotch will, or under a testamentary, produces it to the secretary of the railway Company immediately after the testator's death, it becomes obligatory upon him, within six months (and perhaps before, for probably the procuring the name of the executor to be put on the registry would be intermeddling or intromitting with the property in Scotland), to exhibit an inventory, and to pay the duty upon it. I think that this is the true construction of the acts of parliament, and that the 20th section of the 8 & 9 Vict. c. 17 puts persons who have obtained probate in England upon the same footing as executors acting on a testamentary in Scotland; and that the duty is payable in Scotland, and the inventory must be exhibited in the proper Commissary Court there.

WATSON, B.—I am of opinion, that the Crown is entitled to judgment. I confess I never had any doubt upon the point. By the 38th section of the 48 Geo. 3, c. 149, the inventory must be exhibited upon the intromitting with, or entering upon the possession or management of the estate or effects in Scotland, or at all events within six months after the executor taking upon himself the settlement or the management of the estate; and this information is for not filing an inventory within the six months. The special verdict finds that probate has been obtained in England, and probate duty paid here. The mode in which probate duty is collected in Scotland is, not by a probate granted in Scotland or any proceeding analogous to a probate, but an inventory is required to be filed, stating the amount of the property, upon which the duty is to be calculated and paid. Now, inasmuch as it would be necessary, in transferring the

property after the death of the shareholder, to produce the will in Scotland and give other evidence to the railway Company, this enactment is made by the 20th section of 8 & 9 Vict. c. 17:—"The probate of the will, or the letters of administration, or an official extract therefrom, obtained from any Prerogative Court if granted in England, or a testamentary, or a testament dative if expedite in Scotland, or an official extract thereof, shall together with such declaration be produced to the secretary; and upon such production in either of the cases aforesaid the secretary shall make an entry of the declaration in the said register of transfers." Now, supposing there had been no probate in England, in what mode would the transfer have taken place? The shares would have been transferred on the production in Scotland of the testamentary with the declaration. The section in question, in order to prevent the inconvenience of bringing a will from London to pass a few shares in Scotland, provides, that the probate when produced with the proper declaration, shall be the evidence upon which the transfer is to take place, and nothing more. By the acts of parliament regulating probate duty, it is simply payable upon the property situate within the province or diocese wherein the probate is granted. The power of the ordinary is not with respect to the person, but with respect to the goods—he does not grant probate with respect to the individual, but with respect to the goods within the diocese or province. The Act does not provide that these shares are to have their situs in Canterbury, although the railway is in Scotland; therefore, its meaning is simply this, if a testator has bona notabilia in England, and the executors obtain probate in England, that when produced shall be evidence to satisfy the secretary, and on which he is to make the transfer. It was not intended in any way to abrogate the force and effect of the

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act of parliament on which the Crown collects the duty in Scotland. Nay, more, if the testator had no property in England, and these shares in Scotland were all the property he possessed in the world, the ordinary would have had no jurisdiction. The intention was merely to facilitate the mode of transferring the shares in Scotland, and for that reason, I think that the right to have the inventory exhibited in Scotland still remains, and therefore the Crown is entitled to our judgment.

Judgment for the Crown.

June 2

EX PARTE CROSS.

This Court will grant a rule calling on a committing magistrate to shew cause why a writ of habeas corpus should not issue to bring up a prisoner, in order that the validity of the warrant of commitment may be discussed on shewing cause.

HUDDLESTON moved for a rule calling upon Thomas Bent Esq., (the committing magistrate) to shew cause why a writ of habeas corpus should not issue directed to the keeper of the house of correction at Derby, commanding him to have the body of the said Thomas Cross and the original warrant of commitment of the said Thomas Cross before this Court on a day to be named.

In support of the application it was stated that a writ of habeas corpus had been previously obtained, which the gaoler had refused to obey, on the ground that he had not received the expences of the conveyance of the prisoner to Westminster (a), under the statute, and it was urged that the validity of the commitment might be discussed on shewing cause; and the case of *In re Elizabeth Jones* (b) referred to. [*Pollock*, C. B.—In the case of *Ex parte Martins* (c) my brother *Patteson* was informed by one of the officers of the Crown Office that it was never the practice to waive

(a) 31 Car. 2, c. 2, s. 2.

(b) 7 Exch. 586.

(c) 9 Dowl. 194.

the necessity of a party's appearing before the Court on a habeas corpus, where the validity of a commitment is to be discussed, and though he regretted that the defendant should be put to the expence of a habeas corpus, he said that he could not alter the practice in that particular. However, we have adopted a different practice. It is very much in ease of a poor man who thinks he has a right to be discharged, if the expences which would be incurred in causing him to be brought up under a habeas corpus under 31 Car. 2, c. 2, s. 2, can be saved to him (a).]

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Rule accordingly.

The original warrant of commitment bore date the 4th of May; but it appeared that on the 21st of May an amended warrant of commitment had been lodged with the gaoler, which was unobjectionable.

C. G. Merewether now shewed cause upon these grounds on behalf of the magistrate.

Huddleston argued in support of the rule, and referred to *Chaney v. Payne* (b).

Per CURIAM.—The rule must be discharged. The case of *The Queen v. Richards* (c) is a conclusive authority.

Rule discharged.

(a) In Chitty's General Practice, Vol. 1, p. 693, it is said: "The course formerly was to bring up the party into Court in all cases however great the distance; but of late, where the Court thinks fit, upon having affidavits of poverty or inability to travel, they will grant a rule to shew cause and decide upon

motion whether the party shall be discharged or bailed, and if the latter, will direct the bail to be taken before a magistrate in the neighbourhood: *Rex v. Jones*, 1 B. & Ald. 209; *Rex v. Massey*, 6 M. & Sel. 108.

(b) 1 Q. B. 712.

(c) 5 Q. B. 926.

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June 9.

COLLETT v. FOSTER.

Trespass for false imprisonment. Pleas: Not guilty, and justification under a ca. sa. —Replication, to second plea.

—That the ca. sa. was irregularly obtained, and set aside for irregularity. It was proved at the trial that judgment having been entered up against the plaintiff, on a warrant of attorney, for 60*l.* given to the defendant to secure the payment of a debt by instalments of which less than 20*l.* were due, the defendant's attorney caused the plaintiff to be arrested under a ca. sa., indorsed to levy 21*l.* 10*s.* The defendant having been informed that the plaintiff had been arrested by a person who had joined in

the warrant of attorney, wrote a letter in answer not denying that such arrest had taken place by her authority. The writ was afterwards set aside by order of a Judge.—*Held*, first, that the replication was proved.—Secondly, that the defendant was liable in trespass for the act of her attorney in improperly causing the plaintiff to be arrested. (*Dubitante, Bramwell, B.*)—Thirdly, that there was evidence to go to the jury that the defendant had authorized the arrest.

**TRESPASS.**—The declaration stated that the defendant assaulted, arrested, imprisoned and beat the plaintiff, whereby the plaintiff was injured in credit and reputation, and put to expense.

Pleas.—First: Not guilty.—Secondly: Justification under a writ of ca. sa., in an action in which the now defendant was plaintiff.

Replication to the second plea.—That the ca. sa. was irregularly obtained and was set aside for such irregularity.

At the trial before *Martin, B.*, at the Middlesex sittings after last Term, it appeared that the defendant had lent 30*l.* to the plaintiff and a Mrs. Bass, payable by instalments of 4*l.* a month, for which they had given a warrant of attorney to enter up judgment for 60*l.* Some instalments being due amounting to 18*l.*, judgment was signed for the sum of 60*l.*, and on the 26th of February a ca. sa. issued, indorsed to levy 21*l.* 10*s.*, under which the plaintiff was arrested and carried to Whitecross Street Prison. Mrs. Bass stated that she had paid a sum of 6*l.*, leaving 12*l.* only due, and that she wrote to the defendant to inform her that Lewis her attorney had wilfully or by mistake caused the plaintiff to be arrested. The defendant wrote the following letter in answer.—“In reply to your letter, I beg to say that I have seen Mr. Lewis, and your cause of complaint arises from mis-

understanding the business arrangements. Mr. Lewis had always been ready to allow the 6*l.*, but the understanding was that such allowances should not occur until Mr. Butler's bill for 12*l.*, which is now dishonoured, had been paid; but to save Mr. Collett any trouble, Mr. Lewis has instructed the attorney to allow the supposed overcharge." On affidavits shewing that in fact 20*l.* was not due to the defendant, on the 14th of March an order was made by *Coleridge, J.*, setting aside the *ca. sa.* on that ground, and the plaintiff was discharged from prison.

At the close of the plaintiff's case, the defendant's counsel urged that the defendant had not herself committed any illegal act, and that she was not liable for an illegal act done by her attorney unless it was shewn that she expressly authorized it. The learned Judge told the jury that in his opinion the imprisonment was illegal, and that the plaintiff was entitled to damages, but he left it to them to say whether upon the evidence they thought that the defendant had authorized the arrest. The jury found a verdict for the plaintiff.

*Hawkins*, in the present term, obtained a rule to shew cause why a new trial should not be had, on the ground that the learned Judge misdirected the jury on the plea of not guilty, in telling them that there was evidence of the liability of the defendant and also in directing them that the arrest under the circumstances afforded a ground of action; that the *ca. sa.* was not irregular but simply erroneous, and that the learned Judge ought to have directed the jury that an arrest under it afforded no ground of action, and that the verdict was against the evidence.

*Shee, Serjt.*, and *Unthank* now shewed cause.—First: as to the plea of not guilty. The letter of the defendant was evidence that the client was cognizant of all that was done. But if that were not so, a client is answerable for the

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act of his attorney as if it were his own. It makes no difference that the ca. sa. was illegal: *Barker v. Braham* (a). [Pollock, C. B.—A man who employs an attorney to act for him in a cause in one of the superior Courts, employs him to represent him in every stage of the cause. What the attorney does is the act of the client.] *Jarman v. Hooper* (b) is an authority to that effect. [*Bramwell*, B.—This is not the case of a thing which might have been done but was done irregularly; it was an act wholly illegal. Can a client, who gave no instructions to an attorney to do such an act, be rendered liable for it?—Secondly, the replication was proved and is a good answer to the plea. It is well established, that if a writ is set aside on the ground of irregularity it is the same as if it had never existed: *Prentice v. Harrison* (c). It is not necessary to consider whether that case was rightly decided; and whether it is not enough to shew that the writ has been set aside by a Judge's order, in order to sustain the replication. Here it appears that the ca. sa. was set aside on the ground that 20*l.* was not due. That was an irregularity only: *Blew v. Steinau* (d). It cannot be said that this writ was set aside on the ground of error. There is no error on the record; the writ was regular and followed the judgment, and the indorsement was not erroneous but irregular: R. Hil. T. 1853, r. 76.

*Hawkins*, in support of the rule.—The arrest in the present case was illegal, not irregular. [*Martin*, B.—Would the action have been sustainable if the writ had not been set aside.] The attorney, and not the client, is the party liable for an act of this sort. It will not be found in any of the cases, that the client has been held liable for acts done by the attorney under process which was wholly void.

(a) 2 W. Bl. 866.

(c) 4 Q. B. 852.

(b) 6 Man. &amp; G. 827.

(d) 11 Exch. 440.



The 7 & 8 Vict. c. 96, s. 57, forbids the issuing of a ca. sa. upon any judgment in any action for the recovery of any debt where the sum recovered shall not exceed 20*l*. The act of the attorney is similar to that of a servant who, while driving his master's coach, of his own accord strikes a person with his whip; for that the master would clearly not be liable. The general rule is, that a principal is not liable in trespass for the act of his agent, unless he authorized it beforehand or subsequently consented to it, with knowledge of what had been done. Accordingly in *Freeman v. Rosher* (a), in an action of trespass against a landlord, where it appeared that he gave a broker a warrant to distrain for rent, and the broker took away and sold a fixture and paid the proceeds to the defendant, who received them without inquiry, but without knowing that anything irregular had been done, it was held that the action was not sustainable. [*Unthank*.—This was a debt payable by instalments; therefore the attorney must have taken his instructions from his client as to the sums paid.]

POLLOCK, C. B., now said.—We are of opinion that the rule for a new trial, must be discharged. The action was against the client for misconduct in a suit by the attorney. The case of *Barker v. Braham* (b) is directly in point; and if I were disposed to differ from the principle there laid down, I should still feel myself bound by that decision. I think there is a great distinction between employing an attorney who represents the parties in a suit, and employing a contractor to do work, such as building a house. In the latter case, the employer is not liable for the acts of the contractor: the contractor is responsible and the employer is not; but it certainly has always been held, and I am not aware that in any text book or in any case there will be found a single exception to the rule, that a

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(a) 13 Q. B. 780.

(b) 2 W. Bl. 866.

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person is liable for the acts of his attorney in the conduct of a suit at law brought under his authority. He gives to the attorney the right to represent him, and he is responsible for whatever the attorney does. Such is the law, and we are not competent to change it. Were it otherwise, the letter which has been referred to clearly shews that the defendant knew what her attorney was doing, that she left him to follow his own course, and that the conduct of the attorney was very much governed by communication with her personally. That would make the defendant liable (apart from the question of law) in point of fact.

MARTIN, B.—I am of the same opinion. I believe it has been long settled, that when a defendant has been arrested under a writ of ca. sa., which is afterwards set aside, the sheriff can justify under the writ, but the plaintiff in the suit is responsible in trespass. I always thought that *Barker v. Braham* (a) had settled that point, and I was prepared to have told the jury at the trial that the defendant was liable upon that ground. But then there was the defendant's letter, and I thought it better to ask the jury whether they did not think that the defendant had authorized the issuing of the writ. A client is responsible for a writ issued on his behalf by his attorney. To make a distinction between writs set aside on the ground of irregularity and on the ground of their not being warranted by the statute referred to, would introduce difficulties. If the writ issued in course of law, and was set aside, I should be prepared to hold the client liable. Here the writ was set aside by an order of my brother *Coleridge*;—whether he was wrong or right, is a matter with which the Judge at Nisi prius has no concern. All that he has to do is, to see that the Judge had authority to act. Once set

(a) 2 W. Bl. 866.

aside, the operation of the writ for the protection of the party is at an end.

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BRAMWELL, B.—I concur with the rest of the Court, though not without some misgiving. Upon the question as to the replication, I am inclined to think the material point is, whether the writ was set aside or not. As to the case of *Prentice v. Harrison* (a), there may be some doubt whether the rule there laid down is correct. It appears to me that the effect of this replication is to traverse the writ, by shewing that it was quashed and annulled by the Court from which it issued. As to the question upon the plea of not guilty, the plaintiff proved that a writ issued in a suit in which the defendant was a party, and that the defendant's attorney issued it. Then the question arises, is the client liable for an act of the attorney which he was not authorized by law to do? I cannot distinguish this case in principle from *Freeman v. Rosher* (b). The client may be liable if the attorney act inadvertently or ignorantly. If a *fi. fa.* is set aside as being merely irregular the client is doubtless liable. But can this defendant be made liable for an act which she cannot be supposed to have authorized her attorney to do? I have a great desire in all cases to make the actual wrong doer alone responsible, and to limit the doctrine of "respondeat superior." Here it is clear that the attorney might have been sued. I cannot altogether concur in the grounds of the judgment upon this point, but I agree that the rule must be discharged on the ground, that the defendant when written to by a person who had a right to put a question to her, in her answer does not deny that the writ of *ca. sa.* was issued by her authority. I think that is evidence for the jury, though it is very probable that the defendant did not know that the writ was wrong.

(a) 4 Q. B. 852.

(b) 13 Q. B. 760.

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WATSON, B.—I am of opinion that this rule ought to be discharged. I have always understood, that where a party employs an attorney, and judgment is obtained and execution issued, and that execution set aside on the ground of irregularity, then the client is liable for any act of trespass under that process. The writ is a justification to the officer but not to the party. The attorney who has gone beyond his duty becomes responsible with his client. An attorney is a peculiar kind of agent; in the Court he is put in the place and stead of the client, and is authorized to take proceedings on his behalf; but the client, who rarely knows what proceedings the attorney takes, is responsible. This principle has been so long settled and laid down in the books that I do not wish it to be understood that I entertain the slightest doubt upon this subject. Next, is this a case of irregularity? Most unquestionably it is. The process was not void. There are many cases in which the principal is not responsible, as, if a writ issues against the goods of A., and the sheriff takes the goods of B., the client would not be responsible. So in *Freeman v. Rosher* (a) where a broker who was employed to seize goods took a fixture. But the general rule in the case of attorney and client is, that when legal process issues, and a trespass is committed, and the writ is afterwards set aside, the principal becomes liable. The contest generally is, not whether the client, but whether the attorney is liable.

Rule discharged.

(a) 13 Q. B. 780.

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*2d. def. aff'd in Error  
2 H & N 684*

PRESTON and Others v. TAMPLIN and HOLMES.

May 23.

**D**EBT, for goods sold, and on accounts stated.

Plea, by the defendant Holmes.—Never indebted.

The defendant Tamplin allowed judgment to go by default.

At the trial before *Martin, B.*, at the last Liverpool Assizes, it appeared that the action was brought to recover the price of certain furnace bars, a safety valve, and other like articles supplied by the plaintiffs to be used in repairing the steamer "Rose." Previously to March, 1856, the defendant Holmes was the sole owner of the "Rose." On the 3rd of March, 1856, the following agreement was made between the defendant Holmes of the one part, and Thomas M'Clune and the defendant Tamplin of the other part.

"Liverpool, 3rd March, 1856.

"Memorandum of agreement made this day between J. N. Holmes of the one part, and T. M'Clune and F. A. Tamplin of the other part. Whereas J. N. Holmes is sole owner of the steamer 'Rose,' 348 tons register, of the port of Bristol, subject, &c. And whereas the said vessel is now at the port of Glasgow, where she has been undergoing repairs and improvements, and various debts and demands have been incurred amounting to 1800*l.* or thereabouts, which are still unpaid. And whereas J. N. Holmes has

H. being the owner of a steamer sold 32-64th shares in her to M'C. & Co., and agreed that they should have the full and exclusive direction, management and control of the said steamer, to be dealt with and managed by them as managing owners and ship's husbands as they might think best without any let or hindrance of the said H., and as such managing owners and ship's husbands should have 5 per cent. on the gross earnings to be made or produced in any employment or service in which the vessel might be engaged by them. It being part of the agreement that M'C. & Co.

were to pay to H. 900*l.* as a charter for his 32-64ths for the first six months, for which sum M'C. & Co. were to have the entire use and control of the steamer and all her earnings for that period. Repairs having become necessary during the continuance of the charter.—*Held*, that under the agreement M'C. & Co. had power, as ship's husbands, to bind H. by contracts for such repairs, and that such repairs having been done, H. was liable for the price to the persons employed by M'C. & Co. as agents for the parties liable.

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agreed to sell, and T. M'Clune and F. A. Tamplin to purchase 32/64th shares, or one half share or interest of and in the said steam vessel 'Rose' as she now stands, including all additions and improvements made thereto or therein, and her apparel, furniture, boats and other things appertaining or belonging thereto, at the sum of 2500*L*., which is to be paid, &c., and thereupon the said J. N. Holmes shall transfer into the names of the said T. McClune and F. A. Tamplin as partners, or either one of them, one full half share or interest, or 32/64th parts or shares of and in the said steamer 'Rose,' and her apparel and furniture as she now stands, free, &c. And in consideration of the purchase by T. M'Clune and F. A. Tamplin the said J. N. Holmes hath agreed with them that they should have the full and exclusive direction, management and controul of the said steam vessel 'Rose,' to be dealt with and managed by them, as managing owners and ships' husbands, as they might think best, without any let or hindrance of the said J. N. Holmes, and as such managing owners and ship's husband to have and be entitled to by any way of commission for their services in that behalf the sum of 5 per cent. on the gross earnings to be made and be produced in any employment or service which the said vessel may be engaged by them. Now this agreement witnesseth that for the considerations aforesaid the said J. N. Holmes doth hereby agree to sell and transfer, and the said T. M'Clune and F. A. Tamplin to purchase and take one full half share of and in the said vessel, being equal to 32/64th parts or shares therein, at the sum of 2500*L*., to be paid, &c., and that free from all incumbrances. And the said J. N. Holmes doth further agree and engage with them, that he the said J. N. Holmes is sole owner of the said vessel, subject, &c. And further, that the said T. M'Clune and F. A. Tamplin shall henceforth be and become the managing and

exclusive owners for the purpose of employing the said vessel in any service they may think fit, and as such shall be entitled to deduct, and take by way of commission, the commission or remuneration of 5 per cent. on and from the gross earning of the said vessel, so long as they the said T. M'Clune and F. A. Tamplin shall remain owners of 32/64th parts or shares of the said vessel.—(Then followed a penalty for nonfulfilment of the agreement).—It being part of this agreement that the said M'Clune and Tamplin are to pay to the said J. N. Holmes 900*l*. (say nine hundred pounds) as a charter for his thirty-two sixty-fourth shares for the first six months from the date of the vessel being ready to receive her outward cargo from Liverpool, for which sum of nine hundred pounds the said M'Clune and Tamplin have the entire use and controul of the said steamer 'Rose,' and all her earnings for that period.

Signed

J. N. Holmes,

M'Clune and Tamplin."

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Soon after the making of the agreement 32-64th shares in the steamer were by arrangement between Messrs. M'Clune and Tamplin transferred to Tamplin, and the defendants Tamplin and Holmes were duly registered as joint owners of the "Rose," each being stated in the register to be the owner of 32-64ths. In July, 1856, while M'Clune and Tamplin had the entire use and controul of the steamer, in pursuance of the last clause of the agreement, her boilers being in bad condition, the defendant Tamplin, as agent for the parties liable, ordered new boilers to be put in, and the furnace bars, safety valve, and other goods, for the price of which the action was brought, all which were used for the purpose of repairing the steamer. The repairs were necessary, and such as are usually paid for by owners, and not by the charterers, when ships are under charter, and were for the permanent advantage of

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the ship. It was not shewn that the defendant Holmes was party or privy to giving the order for the goods. Upon these facts, under the direction of the learned Judge, a verdict was found for the plaintiffs, leave being reserved to the defendant Holmes to move to enter a nonsuit.

A rule nisi having been obtained accordingly,

*Milward* shewed cause.—M'Clune and Tamplin are by the agreement appointed managing owners and ship's husbands; they were also the charterers of the steamer during the time when these repairs were done. It is clear that if the ship had been chartered by third parties, M'Clune and Tamplin would have had a right as managing owners to order these repairs. From the 900*l*, which they were to pay for the use of the vessel for six months they would have had a right to deduct a moiety of the ship's wages, and of all such necessary expenses as ordinarily fall on the owners of a ship which is chartered. Now the owner of a ship which is chartered is ordinarily bound to keep it in a condition to do the work for which it is hired. It was proved that the repairs were necessary. As charterers M'Clune and Tamplin were not bound to repair, but as managing owners and ship's husbands they had power to do what was prudent, and in so doing to bind the defendant Holmes, who is therefore liable.

*Manisty*, in support of the rule.—The earnings of a ship are what she makes after paying the expenses incident to the ship, such as wages, repairs and the like. M'Clune and Tamplin, who were to have the earnings for six months, must, therefore, pay all outgoings. The question of liability depends wholly upon the authority which Tamplin had to bind his co-owner. *Reeve v. Davis* (a), *Mitcheson v. Oliver* (b). If two joint owners of a ship work

(a) 1 A. & E. 312.

(b) 5 E. & B. 419.



her jointly, they may be jointly liable on contracts; here, however, the defendant Holmes had given up the ship to M'Clune and Tamplin the charterers, who gave the order. No credit was given to Holmes, who therefore cannot be made liable.

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*Cur. adv. vult.*

POLLOCK, C. B., now said.—We are of opinion that the rule to enter a nonsuit must be discharged. The question turns upon the effect of the following memorandum of agreement; (His Lordship then read the agreement). During the course of the six months, during which M'Clune and Tamplin had possession of the vessel, some considerable repairs were required. These repairs were ordered by the ship's husbands, and the question is, whether Holmes is bound by the act of the ship's husbands, who were co-owners with him. We are of opinion that as ship's husbands they had power to repair the vessel. The charterers were not bound to repair, and it may be that the owners were not under this agreement bound to repair, as between themselves and the charterers; but if M'Clune and Tamplin, as ship's husbands, thought it advantageous for the owners that the vessel should be repaired, we are of opinion that it was competent to them to bind the other owner.

Rule discharged.



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June 10.

## THE ATTORNEY GENERAL v. HALLETT.

By the 21st section of "The Succession Duty Act, 1853," the duty chargeable on the succession to real property shall be paid by eight half-yearly instalments: "Provided that if the successor shall die before all such instalments shall have become due, then any instalment not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest."—*Held*, that the words "competent to dispose by will" had reference to the interest in the property and not to the personal capacity; and therefore that the duty was chargeable notwithstanding the successor was incompetent to make a will by reason of lunacy or coverture.

**T**HIS was an information by the Attorney General for duty payable by the defendant under "The Succession Duty Act, 1853." The question for the opinion of the Court was raised by a special verdict (in substance), as follows:—

John Kellaway, before and at the time of his death, was seised in his demesne as of fee of and in certain lands in the county of Dorset; and being so seised, the said John Kellaway, after the coming into operation of "The Succession Duty Act, 1853," that is to say, on the 21st of August, 1853, died intestate, and left as his co-heirs him surviving three sisters, one niece, and one nephew, that is to say, his sister Lucy Kellaway, spinster; his sister Martha Bartlett, widow; his sister Margaret Kerslake, widow; his niece Sarah Hallett, the wife of the defendant Joseph Hallett (which Sarah Hallett was the only child and heir-at-law of another sister, theretofore deceased, of the said John Kellaway); and John Groves the son of another sister, theretofore deceased, of the said John Kellaway. There became and was due to her Majesty, by virtue of the said Act, as and for succession duty in respect of the interest of the said Lucy Kellaway of and in the said real property which so descended and came to her as such sister and co-heiress of the said John Kellaway, on his death, the sum of 11*l.* 16*s.* 2*d.*, payable by eight equal half-yearly instalments of 1*l.* 9*s.* 6*d.* each: the first instalment at the

expiration of twelve calendar months after the death of the said John Kellaway, and the seven following instalments at half-yearly intervals of six calendar months each, to be computed from the day on which the said first instalment became due ; and before the expiration of the said twelve calendar months after the death of the said John Kellaway, and before the time for payment of any of the other instalments had arrived, that is to say, on the 11th June, 1854, the said Lucy Kellaway died intestate and without being, or ever having been, married. The said Lucy Kellaway from the time of the death of the said John Kellaway until her own death, continued to be and was seised in her demesne as of fee of and in the said share and interest of and in the said real property, which so as aforesaid descended and came to her as the sister and co-heiress of the said John Kellaway ; and the said Lucy Kellaway was during all that time of unsound mind, and by reason thereof incompetent to make a will or to dispose of the said property thereby ; and she left as her co-heirs her surviving her said two sisters, the said Martha Bartlett and Margaret Kerslake, her niece the said Sarah Hallett, and her nephew the said John Groves ; to whom as such co-heirs the said share and interest of the said Lucy Kellaway then and there came and descended. After the death of the said Lucy Kellaway, and from thence continually until, and at and after, the accruing due and the demanding of the instalment of 1*l*. 9*s*. 6*d*. next hereinafter mentioned, the said share and interest of the said Sarah Hallett in the said real property became vested in the defendant Joseph Hallett, who in right of his wife Sarah Hallett, was, together with the said Martha Bartlett, Margaret Kerslake, and John Groves, in the actual receipt of and beneficially entitled to the rents and profits of the said share and interest of the said Lucy Kellaway deceased of and in the said real property ; and the

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defendant did, before he was required to pay the instalment next hereinafter mentioned in right of his said wife and of her share and interest of and in the said rents and profits, actually receive to his own use from and out of the said rents and profits a sum exceeding the sum of 1*l*. 6*s*. 6*d*., that is to say, the sum of 10*l*.—(The special verdict then stated a demand by the Commissioners of the Inland Revenue of the 1*l*. 9*d*. 6*d*., as the first instalment due for succession duty in respect of the succession of Lucy Kellaway, and the non-payment thereof.)—The special verdict then proceeded to state that after the death of John Kellaway, and whilst Sarah Hallett was the wife of the defendant, there was due for succession duty in respect of the interest of Sarah Hallett in the real property, which so descended to her as such niece and co-heiress of John Kellaway, the sum of 11*l*. 16*s*. 2*d*., payable by eight equal half-yearly instalments of 1*l*. 9*s*. 6*d*. each: that Sarah Hallett paid the two first instalments, but before the third became due, that is to say, on the 10th of May, 1855, Sarah Hallett died, having been from the death of John Kellaway until her death the wife of the defendant, and by reason thereof incompetent to make a will of her continuing interest in the said property, and her husband, the defendant, survived her; and (a child having been born) the defendant became and was and still is tenant by the courtesy of the share and interest in the real property, which so descended to Sarah Hallett as such niece and co-heiress of John Kellaway: that the defendant, as such tenant by the courtesy, was in the actual receipts of the rents and profits: that he was required to pay the sum of 1*l*. 9*s*. 6*d*., as a third instalment for succession duty in respect of the succession of Sarah Hallett, and the same had not been paid.—The special verdict then stated the respective amounts of duty payable on succession of Lucy Kellaway and Sarah Hallett, and concluded, in the usual form, by stating, that if the Court

should be of opinion that the defendant was liable to pay the respective amounts of duty, they were due from him.

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*The Attorney General* (with whom were *The Solicitor General*, *Bevan* and *Thring*), for the Crown.—This case raises a question as to the meaning of the words “competent to dispose by will,” in the 21st section of “The Succession Duty Act, 1853;” (a)—whether they refer only to an interest which may be transmitted by will or the power of disposing of an interest by will; or whether they include not only the interest or power, but also the personal capacity of the successor. The principle of the Succession Duty Act is, that every estate is treated as an annuity; and when a person succeeds to an estate, that is regarded as a life interest only,

(a) 16 & 17 Vict. c. 51, s. 21.  
—“The interest of every successor, except as herein provided, in real property, shall be considered to be of the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto; and every such annuity, for the purposes of this Act, shall be valued according to the tables in the schedule annexed to this Act; and the duty chargeable thereon shall be paid by eight equal half-yearly instalments, the first of such instalments to be paid at the expiration of twelve months next after the successor shall have

become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable, and the seven following instalments at half-yearly intervals of six months each, to be computed from the day on which the first instalment shall have become due: Provided that if the successor shall die before all such instalments shall have become due, then any instalments not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest, in exoneration of his other property, and shall be payable by the owner for the time being of such interest.”

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which is valued, and is then liable to duty which, for the ease of the subject, is payable by instalments. It, therefore, became necessary to provide for the case of a successor, liable to duty, dying before all the instalments were payable; and it was considered that this distinction ought to be made:—If a person succeeds to an estate as tenant for life, and dies before all the instalments are paid, his successor becomes liable to duty; and that duty should be taken as a substitute for the amount payable by the deceased tenant for life; but if the successor, who is liable to duty, has a power of disposing of the fee simple, then the amount unpaid at his death ought to be regarded as debt due from him, because he had such an estate as he might have disposed of by will. These considerations shew, that by the words “competent to dispose by will,” the legislature intended to refer to the quantum of interest, and not the capacity of the person. Indeed the whole tenor and context of the 21st section points out, that what was intended to be referred to was the possession of an interest capable of being made the subject of testamentary disposition or the possession of a power capable of being exercised. Suppose a person succeeds to an estate as tenant in tail, the succession duty is then ascertained and it is payable by instalments; but if the tenant in tail dies, without having barred the entail, before one half of the instalments become due, it was intended that the unpaid half should remain a debt due from him. Therefore the words “competent to dispose by will” were introduced into the 21st section, instead of the ordinary term “seised of an estate of inheritance.”

The Court then called on

*Hugh Hill*, for the defendant.—Where a tax is imposed on the subject, if there be an exception it ought to be

liberally construed: *Warrington v. Furber* (a). [*Pollock*, C. B.—The legislature could never have intended to make a distinction between sane and insane persons with regard to paying a tax.] The question is, what has the legislature said? By the 21st section each instalment is to be paid as it becomes due, and it is provided that as to those instalments not due at the time of the death of the successor, they shall cease to be payable, “except in the case of a successor who shall have been competent to dispose by will of a continuing interest.” Now, reading those words according to their plain grammatical meaning, they necessarily involve two things, viz., capacity in the person to make a will, and such an interest in the property as to be capable of disposing by will of a continuing interest. The Court are asked to put this construction on the words—that a person who is incompetent to dispose by will of anything whatever, is competent to dispose by will of a continuing interest. “Competent” is a term well-known in the law, and is constantly used with regard to two subjects, viz., witnesses, and the capacity of individuals to make wills. In *Wright v. Tatham* (b) all the Judges, with one exception, use the words “competent” and “incompetent” when speaking of the capacity of the testator. In the case of *In re Micklethwait* (c), where the question arose on this same statute, *Parke*, B., said:—“It is a well established rule, that the subject is not to be taxed without clear words for that purpose; and also that every act of parliament must be read according to the natural construction of its words.” [*Pollock*, C. B.—The ordinary meaning of the expression “incompetent to make a will” is confined exclusively to the intellect of the party, and not to his interest in the property. I doubt whether in any language it will be

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(a) 8 East, 242.

(b) 5 C. &amp; F. 670.

(c) 11 Exch. 452.

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which is valued, and is then liable to each the words  
 ease of the subject, is payable by inst both. [*Martin*,  
 became necessary to provide for A. and B. an estate  
 liable to duty, dying before all to say that A. was not  
 able; and it was considered th property by will, and that B.  
 made:—If a person succee word “competent” has two  
 and dies before all the judgment, it must mean one thing  
 becomes liable to duty not mean both, we must ascertain in  
 substitute for the senses the legislature has used it. Now  
 for life; but if t<sup>e</sup> of the 21st section imports that the  
 power of disp relates to the property and not the mind of  
 unpaid, at hi because he must be competent to dispose of a  
 him, bec interest; that is, possessing such an interest in  
 posed as to have the power of disposing by will of a  
 wor- interest.] The plain meaning of the words  
 ir not to be departed from, and the term “incompetent”  
 is used in law with reference to capacity only. [*Martin*,  
 K.—The words are “except in the case of a successor  
 who shall have been competent to dispose by will of a con-  
 tinuing interest:” when is the competency to begin?] At  
 any time after the succession takes effect. [*Pollock*, C. B.—  
 Then a lucid interval for a single hour would make the  
 difference whether the duty was payable or not. *Martin*,  
 B.—It is a very useful rule in the construction of a statute  
 to adhere to its plain grammatical language, unless it is  
 at variance with the intention of the legislature or leads to  
 a manifest absurdity. Here it would be at variance with  
 the intention of the legislature, to be collected from the  
 statute itself, and would also lead to manifest absurdity, if  
 the liability to this tax depended on whether a person was  
 in a state of mind to make a will.]

POLLOCK, C. B.—We all agree that the Crown is entitled  
 to judgment. The word “competent,” used as it is here in  
 connection with the words “continuing interest,” means



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"a continuing interest." The two  
her, it appears to me that the  
and "competent," merely to  
will by reason of having  
property as to be able to dis-  
aining the capacity to make one.  
the successor was capable of making  
petent to dispose of a continuing interest,  
of the duty which is unpaid at his death  
ended to be charged on the interest which passed  
the person next in succession. The rule of con-  
struction, so frequently cited by Lord *Wensleydale* in this  
Court, seems to be founded on what was said by Mr.  
Justice *Burton* in a case of *Warberton v. Loveland* (a).  
But in reality it is merely a rule of common sense ;  
and every one who hears language uttered is continually  
correcting its imperfections and removing its ambiguity  
by the mere exercise of ordinary good sense. If one  
meaning only can be applied to certain words, it must be  
presumed that that was the meaning intended ; but where  
the words admit of several meanings, whether in an act of  
parliament or any other instrument, if one of them leads to  
a manifest absurdity, we are bound to adopt that meaning  
which does not. Nothing can be more absurd than to  
suppose that the legislature intended that this tax should  
be payable in the case of a sane and not of an insane  
person, there being no reason why it should not be paid  
by the one as well as the other. The inconvenience and  
litigation which would follow, upon making the liability  
turn upon whether the party was competent to make a will,  
in the sense of intellectual competency, is quite manifest.  
I differ from Mr. *Hill* in respect of what may be called the  
grammatical meaning of the word "competent : " it may be  
used with reference either to the quantity of estate or con-

(a) 1 Hudson & Brooke's Irish Reports, 648.

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dition of intellect, but it cannot mean both. Looking at the question as one of grammar and philology, I think it may be laid down as a rule that when a word having two meanings is used as it is here, it must be understood to mean either one thing or the other, but not both. Then, the word "competent" ought not to be considered as meaning two things, we have to say in which sense it is used by the legislature in this act of parliament. There is no doubt about it, because the language is not, "competent to dispose by will," but "competent to dispose by will of a continuing interest;" and, therefore, it cannot apply to a person who is incompetent to dispose of any interest at all. That alone furnishes strong ground for coming to the conclusion that the legislature did not refer to the state of the successor's mind, but merely to the quantity of interest which he had in the property; so that, if in other respects he was capable of making a will, there was a capacity to dispose of the continuing interest. For these reasons, I think that the Crown is entitled to judgment.

MARTIN, B.—I am of the same opinion. I agree with Mr. Hill, that if a person said to me that another was competent or incompetent to dispose of his property by will, the first impression on my mind would be, that it had reference to the state of intellect of the party. But the words are also applicable to the case of a person having an estate for life with a power to dispose of it by will; and therefore anyone using that language with reference to such a case, either in speaking or writing, would be doing so with perfect propriety. When we find these words in an act of parliament, we must see what they really mean, and I apprehend the first thing is to ascertain the subject-matter of which the legislature was speaking, and what was their intention to be collected from the statute itself. No one

can doubt the intention of the legislature, and that they were speaking of the quantity of interest and not of the capacity of the individual. To make the succession duty depend on whether the individual was of sane or insane mind would be absurd. There is no doubt that the legislature, in using the words "competent to dispose by will of a continuing interest," meant to refer to the quantity of interest, and not the mental capacity of the individual.

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BRAMWELL, B.—I am of the same opinion. It is desirable in all cases to follow the words of an act of parliament and not attempt to vary their ordinary meaning. But that construction must be qualified by the rule referred to, and which my Lord has properly called a rule of common sense. Mr. *Hill* is compelled to admit that the words "competent to dispose by will of a continuing interest," include competency in respect of interest; and he says that they also mean the personal competency of the individual, and therefore if any successor is personally incompetent on account of the state of his mind, he is within the proviso of the section. If that be so, I do not see why he should not have gone further and contended, that if a successor died in prison, where no pen, ink, or paper were allowed, he would also be within the proviso; for in that case he would have been physically incompetent, as in this he was mentally incompetent to make a will. Indeed, if Mr. *Hill's* argument is good, it would follow that if there was any lucid interval, not merely after the succession vested, but if the party was ever sane after he attained the age of twenty-one years; or if he was sane for fifty years before the succession, but afterwards became insane, those would be cases within the proviso. Again, suppose the successor was incompetent to make a will by reason of his not having attained the age of twenty-one years. These considerations shew that the legislature never could have meant what is contended for by Mr. *Hill*.

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I do not see the ambiguity. Suppose the language had been this,—“Except in the case of a continuing interest in such property of which the successor shall have been competent to dispose by will:” it is manifest in that case, that the criterion is the character of the interest and not the mental capacity of the individual. So here, “competency” means a competency in respect of interest and not in respect of the person. We are not called on to deviate from the natural meaning of the words, and their natural meaning excludes *Mr. Hill’s* interpretation. Moreover there is this further difficulty: the special verdict simply says that this lady was incompetent to make a will from the time of the death of the person under whom she took the property. But supposing that before that time she was competent, would she have been incompetent to dispose of a continuing interest within the meaning of the statute? So that the special verdict does not bring the case within the proviso. I do not, however, decide on that ground; but on the grounds put forward by my Lord and my brother *Martin*.

WATSON, B.—I am of the same opinion. The words “competent to dispose by will” are used with reference to a continuing interest; and the legislature meant the criterion to be, whether the successor was possessed of such an interest in the property that he could have created a continuing interest. It never could have been the intention of the legislature that the question whether these unpaid instalments should be a continuing charge on the property should depend on whether the successor was of sound mind. That might be a very long inquiry. Besides, this strange result would follow,—the duty is payable by instalments at certain stated periods; then, suppose that before the first instalment was due, the successor became insane and remained so for ten years, after which he

became of sound mind, there would be no duty payable while he was insane, but it would be payable after he had a disposing mind. Such a state of things is so absurd that it never could have been contemplated by the legislature. I think that the construction of the Act is perfectly clear, and that our judgment ought to be for the Crown.

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Judgment for the Crown.

GELEN v HALL.

May 23.

THE first count of the declaration stated that the defendant caused an assault to be made on the plaintiff, and caused the plaintiff to be apprehended and taken to a certain prison, and unlawfully kept and imprisoned from

By the 6 & 7  
Wm. 4, c. cvi.,  
s. 237 (The  
Eastern Counties  
Railway  
Act), penalties  
are made  
recoverable

before a justice, who is authorized to summon before him any person against whom complaint is made for any offence against a bye-law, and to proceed therein, &c. By the 238th section, "Any officer of the Company is empowered to seize and detain any person whose name and residence shall be unknown to him, who shall commit any offence against the Act, and to convey him before a justice without any warrant, and the justice is required to proceed immediately to the conviction or acquittal of the offender." The plaintiff, having been seized and detained by an officer of the Company, on the 24th of September was brought before the defendant, a justice of the peace, for an alleged offence against a bye-law. The defendant committed the plaintiff to the House of Correction, by a warrant in the Form (O 1.) in the Schedule to the Act, 11 & 12 Vict. c. 43. The warrant stated that the plaintiff had been charged on oath before the defendant, for having travelled on the railway without having paid his fare contrary to a bye-law of the Company, and commanded him to be taken to the House of Correction and there kept until the 27th, and to be then brought before the justices at Petty Sessions to answer the charge. On the 25th, the defendant having ascertained that no offence had been committed sent to the House of Correction, and caused the defendant to be discharged.—*Held*: First, that the defendant was justified, by the 16th section of the 11 & 12 Vict. c. 43, in committing the plaintiff to the House of Correction.

Secondly: That under 6 & 7 Wm. 4, c. cvi., ss. 237, 238, a justice has no authority to issue a warrant before conviction; that the authority to arrest in the first instance is confined to the officer of the Company, and that the duty thereby imposed upon the justice is forthwith, upon the alleged offender being brought before him, to proceed to the determination of the case.

The second count stated that the defendant, a justice of the peace, unlawfully and maliciously, and without reasonable or probable cause, took the information of P. W., against the plaintiff, and wrongfully, wilfully, maliciously, and without reasonable or probable cause, as the defendant well knew, convicted the plaintiff; that the plaintiff was thereby compelled to pay a sum of money, and that upon appeal to the Quarter Sessions the conviction was afterwards quashed. A verdict having been found for the plaintiff, the Court refused to arrest the judgment.

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the time when he was so apprehended for a long time, to wit, thirty hours, whereby the plaintiff was prevented from attending to his necessary affairs and business, and was put to great costs and charges, and was injured in his reputation. Second count.—That the defendant, as and then being one of the justices of the peace of our Lady the Queen in and for the Isle of Ely, on the 25th day of September, 1855, did unlawfully and maliciously, and without reasonable and probable cause, take the information of one Peter Wainwright against him, the plaintiff, for having, on the 23rd of the said month of September, been guilty of a breach of a certain bye-law of the Eastern Counties Railway Company, by travelling on the said railway, from Trowse to Ely, and having refused to deliver up the ticket received by him, the plaintiff, on paying his fare, when required by a servant of the said railway company: And that the defendant, as and being such justice as aforesaid, on the said 25th of September, wilfully, maliciously and without reasonable and probable cause, did issue a summons under the defendant's hand and seal, directed to the plaintiff, whereby he was commanded to appear to answer the said complaint on the 27th of the said month of September, before such justices of the peace for the said Isle as might be then present, and that the defendant, as and being such justice as aforesaid, together with the Rev. Thomas Fardell and Henry Martin, Esquire, two other of the justices of the peace of the said Isle, on the said 27th of September, wilfully, maliciously, and without any reasonable or probable cause, as the defendant well knew, did convict and cause him the plaintiff to be convicted of the said offence against the said bye-law in a penalty of 5*s.* and costs, amounting together to the sum of 17*s.* 6*d.*, and which amount the plaintiff was then and there obliged to pay and

did pay, to prevent him, the plaintiff, from being imprisoned for fourteen days in the House of Correction at Ely aforesaid, which said conviction was afterwards, in due form of law, upon the appeal of the plaintiff against the same, quashed by the justices of the peace in and for the said Isle, at the General Quarter Sessions of the Peace holden in and for the said Isle, and all things were done necessary to give validity to the said quashing, by which grievances plaintiff not only lost the said money, but was obliged to stay for a long time at Ely, away from his business, in order to obey the said summons, and was put to great costs and charges in and about defending himself against the said summons, and appealing against the said conviction, and procuring the said conviction to be quashed, &c.

Plea: (By statute 11 & 12 Vict. c. 44, s. 10) Not guilty. Whereupon issue was joined.

At the trial before Lord *Campbell*, C. J., at the Cambridge Summer Assizes, 1856, it appeared that on the morning of Sunday, the 23rd of September, 1855, the plaintiff, a cattle drover, had taken a ticket from Trowse to London, by the Eastern Counties Railway, and proceeded accordingly by the mail train towards London. It was usual for persons travelling to London to give up their tickets at the Stratford Station. On the arrival of the train at Ely, the plaintiff got out of the carriage, when one Taylor, an inspector on the railway, whose duty it was to take tickets from passengers going to Ely, demanded the plaintiff's ticket. There was a conflict of testimony as to the circumstances under which this demand was made, the plaintiff stating that he said his ticket was for London, but Taylor stating that the plaintiff, on being asked, said he was going to Ely. The plaintiff at first omitted to produce his ticket, but ultimately delivered it to Taylor. The

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ticket bore date the 3rd of September. The error in the date arose from the stamping machine in the booking office at Trowse being out of order. Taylor, however, said, that the ticket was an old one, and refused to allow the plaintiff to go on to London without paying his fare. He then took the plaintiff into custody, and detained him till Monday, the 24th, when he was taken before the defendant, a magistrate for the Isle of Ely. The ticket was handed to the defendant, who examined it, and offered to discharge the plaintiff if he would find bail to the amount of 10*l*., to answer for his appearance before the justices at petty sessions on the following Thursday. The plaintiff not being able to get bail, was committed to the House of Correction. The warrant of commitment was as follows:—

To the constables of the parish of the Holy Trinity, in Ely, in the Isle of Ely, and to the keeper of the House of Correction, at Ely, in the said Isle.

Isle of Ely, } Whereas Thomas Gellen, late of, &c., was  
to wit. } this day charged on oath before the under-  
signed, one of her Majesty's justices of the peace in and for  
the said Isle of Ely, for that he the said Thomas Gellen  
did, on, &c., unlawfully travel in one of the carriages  
belonging to the Eastern Counties Railway Company from  
Trowse to Ely, without having first booked his place and  
paid his fare, contrary to the bye-law in that behalf duly  
made and published by the said railway Company, pursuant  
to the provisions of the Act in that case made and provided,  
and which said bye-law was, at the time of the commission  
of the said offence, and still is in force against the form of  
the statute in that case made and provided, and it appears  
to me to be necessary to remand the said Thomas Gellen.

These are, therefore, to command you the said constable in her Majesty's name, forthwith to convey the said Thomas Gellen to the House of Correction, at Ely, in the



said Isle, and there to deliver him to the keeper thereof, together with this precept, and I hereby command you, the said keeper, to receive the said Thomas Gelen into your custody in the said House of Correction, and there safely keep him until the 27th day of September instant, when I hereby command you to have him at the Justices Room in the Sessions House at Ely, at twelve o'clock at noon of the same day, before me or before such other justice or justices of the peace for the said Isle, as may then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime, &c.

Given under my hand, &c.

(Signed) GEORGE HALL.

On Tuesday morning the defendant, having ascertained that the ticket was correct, sent for the plaintiff to the House of Correction, and told him that he was discharged. The plaintiff was then served with a summons as he was leaving the justice room, calling on him to appear on Thursday, the 27th, before the defendant and other justices assembled in Petty Sessions to answer a charge of unlawfully refusing to deliver up his ticket. The plaintiff having attended in obedience to the summons, the defendant told the other magistrates that the ticket was correct, but the plaintiff was fined 5*s.*, and 12*s.* 6*d.* costs, for not producing it, and told that if the money was not paid he should go to the House of Correction for fourteen days. The plaintiff paid the 17*s.* 6*d.* The conviction was as follows:—

Be it remembered, &c., that Thomas Gelen, late of, &c., is convicted, &c., before us, &c., for that the said Thomas Gelen, on, &c., then being a passenger upon the Eastern Counties Railway from Trowse to Ely, did, at the railway station at Ely, in the said Isle, unlawfully refuse to deliver

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up his ticket when required by a servant of the said railway Company authorized to collect tickets so to do, contrary to the bye-law in that behalf duly made, &c., and against the form of the statute, &c. And we adjudge the said Thomas Gellen, for his said offence, to forfeit and pay 5*s.*, for a penalty, &c., and 12*s.* 6*d.* costs, and if the said several sums be not paid forthwith we hereby order that the same be levied by distress and sale of the goods and chattels of the said Thomas Gellen; and in default of sufficient distress in that behalf we adjudge the said Thomas Gellen to be imprisoned in the House of Correction in the said Isle for the space of fourteen days, unless the several sums and all costs and charges of the said distress be sooner paid.

Given under our hands, &c.

(Signed) THOMAS FARDELL.

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HENRY MARTIN.

The conviction was afterwards quashed on appeal to the Quarter Sessions.

At the close of the plaintiff's case the defendant's counsel contended that the plaintiff must be nonsuited because as to the first count the defendant had jurisdiction to remand the plaintiff; and as to the second count, that there was no evidence of malice, and that want of reasonable and probable cause alone was not evidence of malice. The depositions taken before the defendant on the 24th of September were then put in, and also the bye-laws of the company, made under the 158th section of the 6 & 7 Wm. 4, c. cvi., amongst which was the following:—

“No passenger will be allowed to take his seat in or upon any of the Company's carriages, or to travel therein upon the said railways, without having first booked his place and paid his fare. Each passenger booking his place will be furnished with a ticket, which he is to shew and

deliver up when required to the guard in charge of the train, or to any officer or servant of the said Company authorised to inspect or collect tickets. Each passenger not producing or delivering up his ticket when required is hereby subjected to a penalty not exceeding 40s." (a).

(a) The 6 & 7 Wm. 4, c. cvi., s. 236, is as follows:—

"And be it further enacted, that all penalties and forfeitures inflicted or imposed by this Act, or by virtue of any bye-law, rule or order made in pursuance thereof (the manner of levying or recovery whereof is not herein otherwise particularly directed), may in case of nonpayment thereof be recovered in a summary way, by the order and adjudication of any two justices of the peace acting for the respective counties aforesaid, on complaint to them for that purpose made; and such penalties and forfeitures shall and may afterwards be levied, as well as the costs (if any) of such proceedings, on nonpayment, by distress and sale of the goods and chattels of the respective offenders or persons liable to pay the same, by warrant, under the hands and seals of such justices," &c.

Sect. 237. "And be it further enacted, that in all cases in which by this Act any penalty or forfeiture is made recoverable by information before any justice of the peace, it shall be lawful for the justice of the peace, before whom complaint shall be made for any offence committed against the provisions of this Act, or against any bye-law, order, or rule made in pursuance hereof, to summon before him

the party complained against, and on such summons to hear and determine the matter of such complaint, and on proof of the offence to convict the offender, and to adjudge him to pay the penalty or forfeiture incurred, and to proceed in the recovery of the same, although no information in writing or in print shall have been exhibited before such justice, and all such proceedings by summons without information in writing or in print, shall be as valid and effectual to all intents and purposes as if an information in writing or in print had been exhibited."

Sect. 238. "And be it further enacted, that it shall be lawful for any collector, surveyor, or other officer or servant of the said Company, and such persons as he shall call to his assistance, to seize, and detain any person whose name or residence shall be unknown to such collector, surveyor, or other officer or servant, who shall commit any offence against the provisions of this Act, and to convey him with all convenient despatch before some justice of the peace within whose jurisdiction such offence shall be committed, without any other warrant or authority than this Act for so doing, and such justice is hereby empowered and required to proceed immediately to the conviction or acquittal of each such offender."

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Taylor stated, that after the defendant had been taken into custody he gave his name and address. Watt, the superintendent of the railway at Ely, who was called as a witness by the defendant, stated that it was at his request that the second summons had been granted by the defendant. Watt said, "I called on Mr. Hall, and told him a mistake had been committed, and suggested to him that the plaintiff should be called before him and dismissed. Mr. Hall at once said, By all means. I told him Mr. Cross had suggested that an information might be laid for a breach of the bye-law in refusing to produce his ticket when called upon. I asked Mr. Hall's sanction to grant an information and summons for that offence. To the best of my recollection Mr. Hall told me to go to the office and have it prepared. He expressed his regret that the evidence as to the tickets was not brought forward on the previous day. And then he sanctioned me to prepare the materials for the new prosecution." In answer to a question put by the learned Judge, Watt stated that the prosecution for refusing to shew the ticket originated with him.

Upon the first count Lord *Campbell* told the jury that the imprisonment was lawful, inasmuch as the defendant was acting within his jurisdiction, but directed the jury to find the damages. As to the second count, he said, that the railway Company, instead of acknowledging their mistake, improperly caused a new proceeding to be instituted against the plaintiff for not delivering up his ticket, though they had no right to cause it to be delivered up at Ely; but that the defendant was not answerable unless he knew or believed that the plaintiff had not committed the offence of refusing to deliver up the ticket; that in point of law the offence had not been committed; that if the defendant knew or believed that the offence had not been committed, and lent himself to the improper conduct of the Company,

they would find for the plaintiff. The jury found a verdict for the defendant on the first count, but assessed the damages contingently at 20*l*, and they found a verdict for the plaintiff on the second count, with 5*l* damages beyond the taxed costs of the plaintiff, incurred in procuring the conviction to be quashed. Leave was reserved to the plaintiff to move to enter the verdict for him with the 20*l* damages, and for defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence of want of reasonable and probable cause, or no evidence of malice.

*N. Palmer*, in the following term, obtained a rule nisi to enter a verdict for the plaintiff on the first count, on the ground of the defendant having acted without jurisdiction, and that the warrant did not shew any offence under a bye-law, or within the Isle of Ely.

And in the same term, *Byles*, Serjt., for the defendant, obtained a rule nisi to set aside the verdict for the plaintiff on the second count, on the ground that there was not an absence of reasonable and probable cause, and that there was no evidence of malice: or why the judgment should not be arrested, on the ground that no such action will lie against a magistrate acting judicially.

*N. Palmer* and *J. H. Mills* shewed cause against the defendant's rule (a).—The second count charges the defendant with acting maliciously, and without reasonable and probable cause, in the execution of his office as a justice of the peace. The 11 & 12 Vict. c. 44, s. 1, after reciting "that it is expedient to protect justices of the peace in the execution of their duty," enacts, "that every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such

(a) In Hilary Term, Jan. 27. Before *Pollock*, C. B., *Martin*, B., and *Watson*, B.

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...action on the case as for a tort ;  
 it shall be expressly alleged that  
 maliciously, and without reasonable and  
 and if at the trial of such action upon the  
 the plaintiff shall fail to prove  
 he shall be nonsuited, or a verdict shall be  
 for the defendant." By that Act the legislature has  
 recognised that an action may be maintained  
 of the peace under such circumstances as  
 are disclosed in the second count. In *Kirby v. Simpson* (a)  
 it was taken for granted that such an action would lie, and  
 the only question raised was, whether notice of action was  
 necessary. The defendant's counsel, on moving for this rule,  
 cited the following passage from Burn's Justice, tit. Justices  
 of the Peace, p. 1027 (b) :—"It may be laid down as a  
 general rule that if a justice of the peace in or out of ses-  
 sions has jurisdiction over the subject-matter laid before  
 him, and acts judicially, he is not liable to an action for  
 any act done under it, however erroneous the conclusion at  
 which he arrives may be. Nor is he liable to an action,  
 however corrupt or malicious his motives were in coming  
 to that conclusion, the only remedy in such latter case  
 being by information at the suit of the Queen." That  
 may be true where the justice is acting as a judge of  
 record, as at quarter sessions, but not as applicable to  
 magistrates in petty sessions. Many of the cases may be  
 explained on the ground that as long as the conviction re-  
 mains in force it is a bar to an action. In others, such as  
*Acherley v. Parkinson* (c), there was no evidence of malice.  
 That was the ground of the decision in *Linford v. Fitz-*  
*roy* (d). Lord Denman, in delivering the judgment of the  
 Court in that case, says, "the broad line of distinction is

(a) 10 Exch. 358.

(b) 29th Edition.

(c) 3 M. &amp; Sel. 411.

(d) 13 Q. B. 240.

unless the duty of the magistrate is purely and  
 ministerial he cannot be made liable to an action for  
 a mistake in doing, or omitting to do, anything in exe-  
 cution of that duty, *unless he can be fixed with malice*, which  
 in this case has been negatived by the jury." In *Rex v.*  
*Palmer* (a), which was a rule to shew cause why an infor-  
 mation should not be exhibited against two justices of the  
 peace for a misdemeanor relating to the conviction of a  
 poacher, the Court assumed that such an action would lie.  
 They said that "even where a justice of the peace acts  
 illegally, yet if he has acted honestly and candidly, without  
 oppression, malice, revenge, or any bad view, or ill inten-  
 tion whatsoever, the Court will leave the party complaining  
 to his ordinary legal remedy, or method of prosecution, by  
 action, or by indictment." In *Rex v. Fielding* (b), on shew-  
 ing cause against a rule for an information against a justice  
 of the peace, relating to the committing of one Barnard,  
 on a charge of sending threatening letters, the prosecutor  
 having commenced a civil action was compelled to elect  
 whether to proceed criminally or with the action. The non-  
 liability of judges of courts of record for acts judicially  
 done by them was much considered in *Calder v. Halket* (c)  
 and *Taafe v. Downes* (d). [Watson, B.—These cases were  
 discussed and acted upon in *Houlden v. Smith* (e).] In  
*Taylor v. Nesfield* (f) it is evident that the Court  
 thought that such an action as the present was maintain-  
 able. Erle, J., said, "If the act of a magistrate is done  
 without jurisdiction it is a trespass; if within the jurisdic-  
 tion the action rests upon the corruptness of the motive;  
 and to establish this the act must be shewn to be mali-  
 cious." In *Lane v. Santeloe* (g), an action for a malicious  
 prosecution upon an indictment for felony was maintained

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(a) 2 Burr. 1162.

(e) 14 Q. B. 841.

(b) 2 Burr. 719.

(f) 3 E. &amp; B. 724.

(c) 3 Moo. P. C. 28.

(g) 1 Stra. 79.

(d) 3 Moo. P. C. 86 n. (a).

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against a justice of the peace who had committed the plaintiff.—They also cited *Barton v. Bricknell* (a).

*Byles*, Serjt., and *Couch*, in support of the rule.—First: There was no absence of reasonable and probable cause. The Company had power to make bye-laws. By one of these bye-laws each passenger not delivering up his ticket when required is subjected to a penalty not exceeding forty shillings. The plaintiff was fined five shillings for not delivering up his ticket. Though the defendant formed a wrong judgment as to the meaning of the bye-law, it cannot be said that there was no reasonable or probable cause for his decision.

Secondly: there was no evidence of malice. Absence of probable cause may be evidence of malice where a prosecutor who is a voluntary agent is defendant, but not where a judge is defendant: *Burley v. Bethune* (b).

Thirdly: the judgment must be arrested. The money was paid voluntarily. If it had been levied by distress, possibly before the statute trespass might have been brought after the conviction had been quashed at the Quarter Sessions. But here no trespass was committed subsequent to the conviction. No action lies against a justice for an act done by him in his judicial capacity and within his jurisdiction, though done maliciously and without reasonable and probable cause, and though he may be subject to an indictment or information at the suit of the Crown (c). The statutes relating to actions against justices, 43 Geo. 3, c. 141, and 11 & 12 Vict. c. 44, are restraining, and not enabling, Acts. That appears clearly from the wording of the former Act. The 11 & 12 Vict. c. 44, did not give a new remedy against magistrates where none existed before, but merely changed the form of action.

(a) 13 Q. B. 393.

(b) 5 Taunt. 580.

(c) Burn's Justice, tit. Justices of the Peace, p. 1027, 29th ed.



[*Martin*, B.—If an action will lie against a justice of the peace for acting maliciously the count seems sufficient. In *Kirby v. Simpson* (a), a case which was much considered, all the Judges appear to have thought that the action would lie. *Watson*, B.—I heard that case tried before *Cresswell*, J., and it only decided that assuming the plaintiff's view of the case to be correct, notice of action was necessary.] This case is distinguishable, because in *Kirby v. Simpson* (a) there was a commitment; but here there was no trespass. [*Martin*, B.—No doubt the payment of the five shillings is essential to complete the cause of action here.] There was no duress. Even if there was duress there is no authority for an action against a magistrate for compelling the payment of money by giving a corrupt judgment. In *Linford v. Fitzroy* (b), the defendant acted ministerially in sending the plaintiff to gaol. [*Watson*, B.—The decision by the magistrate that he would not take bail was a judicial act, and the form of action was for maliciously refusing to take bail.] In *Houlden v. Smith* (c) the defendant, the judge of a County Court, had sent the plaintiff to gaol. In *Acherley v. Parkinson* (d) Lord *Ellenborough* says, "The authority of Lord *Coke* and the other cases supposes that the judge has no jurisdiction over the subject-matter to make the action maintainable against him." In *Floyd and Baker's Case* (e) judges and justices of the peace are put upon the same footing as regards "the vehement and violent presumption of law that a justice sworn to do justice will not do injustice," and the consequent immunity from being chargeable with conspiracy for acts done in open Court. Accordingly, in *Hawkins' Pleas of the Crown*, book ii., c. 8, s. 74, (f) it is said, "Justices of the peace are not punishable *civilly* for acts done by them in their *judicial* capacities; but if they

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(a) 10 Exch. 358.

(d) 3 M. &amp; Sel. 411, 425.

(b) 13 Q. B. 240.

(e) 12 Rep. 24.

(c) 14 Q. B. 841.

(f) Seventh Edition, by Leach.

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abuse the authority wherewith they are entrusted they may be punished *criminally* at the suit of the King by way of information. But in cases where they proceed *ministerially* rather than judicially, if they act corruptly they are liable to an action at the suit of the party as well as to an information at the suit of the king." That doctrine is confirmed by *Mills v. Collett* (a).

The Court having intimated a desire to hear the case further argued upon the question whether judgment ought not to be arrested on the second count.

*Couch* (with whom was *Byles*, Serjt.,) was further heard for the defendant in Easter Term (b).—The question is whether at common law an action will lie against a magistrate who wilfully gives a wrong judgment on a matter within his jurisdiction by convicting the plaintiff, there having been no distress or warrant to distrain, and no committal. The statutes do not alter the liability of a magistrate to such an action. In Bacon's Abridgment Justices of the Peace, F., it is said, a justice of the peace, "is not punishable at the suit of the party, but only at the suit of the king for what he doth as judge in matters which he hath power by law to hear and determine without the concurrence of any other; for regularly no man is liable to an action for what he doth as judge." There is no distinction between a judge of record or any other person exercising judicial functions. In 2 Hawk. P. C. c. 8, s. 74, no distinction is made between acts done in sessions or out of sessions. The question of immunity turns upon whether the act done is judicial or merely ministerial. In *Holroyd v. Breare* (c), Lord *Tenterden* held that an action did not lie against the steward of a court baron, on the ground that he

(a) 6 Bing. 85.

and *Channell*, B.(b) April 15. Before *Pollock*,

(c) 2 B. &amp; Ald. 473.

C. B., *Martin*, B., *Bramwell*, B.,

was a part of the court and not a minister of it. [*Martin*, B.—In that case the defendant had done nothing wrong.] In *Groenvelt v. Burwell* (a), which was an action against the Censors of the College of Physicians for improperly convicting the plaintiff under the bye-laws of the College for *mala praxis*, it was held that no action would lie against the defendants for what they did as judges. *Holt*, C. J., saying “that the authority of the defendants was absolute to hear and determine the offence,” and “that persons who are judges by law shall not be liable to have their judgments examined in actions against them.” [*Pollock*, C. B.—The question is not whether a magistrate, who without any evidence wilfully and maliciously convicts a person brought before him, is liable to an action; but whether a man who has really acted as a judge shall have the question tried before a jury.] In this case it was said that the want of probable cause was evidence of malice. *Floyd and Baker's Case* (b) and *Dicas v. Lord Brougham* (c) shew that there is no distinction between a judge of a court of record and another judge. The result of the authorities is, that at common law magistrates were not liable except for trespasses. If a magistrate authorized a trespass and had no jurisdiction, or if there was no conviction, he was liable to an action of trespass: if the conviction was quashed, the conviction being gone, he was left without protection; therefore the statute 43 Geo. 3, c. 141, was passed for the protection of a magistrate under such circumstances. The 11 & 12 Vict. c. 44, does no more than extend the protection given by the former Act. [*Martin*, B.—What protection would the magistrate require if the defendant's contention were well founded?]

In Hilary Term (Jan. 29) the Court called on

(a) 1 Lord Raym. 468.

(b) 12 Rep. 24.

(c) 1 Moo. & Rob. 307.

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*N. Palmer and J. H. Mills* to support the rule obtained on behalf of the plaintiff.—First, the defendant acted without jurisdiction. The warrant of commitment refers to a bye-law (a), but does not shew that the plaintiff committed any offence against that bye-law, or within the Isle of Ely. The offence charged is, that the plaintiff unlawfully travelled in one of the Company's carriages from Trowse to Ely without having first booked his place and paid his fare, contrary to the bye-law in that behalf; but the bye-law imposes no penalty for such an offence. Again, there is no power to apprehend a person for an alleged offence against a bye-law, or to issue a warrant before conviction, but a summons ought to have issued. By the 6 & 7 Wm. 4, c. cvi., s. 236, all penalties imposed by any bye-law may be recovered by order of any two justices of the peace. By the 237th section, when any penalty is recoverable by information before any justice, he may summon before him the party complained against. Here there was no information or summons. The 238th section only enables any *officer or servant of the Company* to seize and detain an offender whose name and residence shall be unknown, for offences committed against the provisions of that Act. The justice has no jurisdiction except on summons, and he must then proceed to the determination of the case without any remand. By the 1 & 2 Vict. c. lxxxi., s. 56, there is power to apprehend any person travelling without having previously paid his fare; but not for refusing to deliver up his ticket. That enactment, however, has no application here, because the warrant refers to an offence against a bye-law, and the bye-law imposes no penalty for such offence. The 145th section of "The Railway Clauses Consolidation Act," 8 & 9 Vict. c. 20, does not affect the case, because that Act only applies to railways to be thereafter con-

(a) *Antd.* p. 385.

structed. Moreover, there was no power to apprehend the plaintiff at Ely, for he was a passenger from Trowse to London.—Secondly, the warrant of commitment is bad on the face of it. It purports to be in the form given in Schedule (D.) of the 11 & 12 Vict. c. 43, but it does not state any information or summons, which by the 12th, 13th and 14th sections of that Act were necessary in order to justify the remand. The 16th section only empowers the justices to adjourn the hearing of an information or complaint instituted in the manner prescribed by the previous sections.

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*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action tried before Lord Campbell at the last Cambridge Summer Assizes. There were two counts in the declaration, the first for an assault and false imprisonment; the second for an alleged wilful and malicious conviction of the plaintiff, without reasonable or probable cause, for the breach of a bye-law of the Eastern Counties Railway Company, by refusing to deliver up his ticket.

The facts proved, so far as they are material to the present judgment, were, that on the morning of the 23rd of September last, the plaintiff paid for and received a ticket at the Eastern Counties Railway Station at Norwich for London. He travelled by the railway to Ely, when one of the Company's officers required him to produce it: after some time, and as to the circumstances connected with which the evidence was contradictory, the ticket was produced. It was a ticket dated the 3rd of September, and the plaintiff was thereupon taken into custody by an officer of the railway Company, who did not then know his name

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or residence, but who was informed of it immediately afterwards. On the following morning (Monday) he was taken before the defendant, a justice of the peace, who committed him to the House of Correction, under a warrant in the Form (D.) in the Schedule to the Act, 11 & 12 Vict. c. 43. The warrant stated that the plaintiff had been charged on oath before the defendant, for having travelled on the railway without having paid his fare, contrary to a bye-law of the Company, and commanded him to be taken to the House of Correction and there kept until the 27th, and to be then brought before the justices at petty sessions to answer the charge. Upon the next day (Tuesday) it was ascertained that the plaintiff had paid his fare and received a ticket, but that in consequence of the stamping machine being out of order the date was marked as the 3rd instead of the 23rd. The defendant being informed of this caused the plaintiff to be sent for from the House of Correction and discharged him; but a summons was then served upon him requiring his appearance on the 27th to answer a charge for refusing to deliver up his ticket. He appeared in consequence, and was convicted in a penalty of five shillings and costs which he paid. The conviction was afterwards quashed by the Court of Quarter Sessions on appeal. The first count was for the imprisonment under the warrant of the 24th September. The chief justice was of opinion that the imprisonment was lawful, but directed the jury to find the damages, and the verdict was entered for the defendant, but leave given to the plaintiff to move to enter the verdict for him for 20*l.*, which the jury found to be the damages. Mr. *Palmer* obtained a rule to enter the verdict accordingly, but we are of opinion that the ruling of the chief justice was right, and that this rule ought to be discharged.

The question depends entirely upon certain acts of parliament. The Railway Clauses Consolidation Act, 1845,

8 & 9 Vict. c. 20, does not apply. It is confined to railways authorized to be thereafter constructed, and the Eastern Counties Railway was made under a previous Act, viz, the 6 & 7 Wm. 4, c. cvi. Under the 158th section of this Act a bye-law had been duly made which imposed a penalty of forty shillings upon any one travelling upon the railway without having booked his place and paid his fare. By the 237th section, penalties are made recoverable before a justice, who is authorized to summon before him any person against whom complaint is made for any offence against a bye-law, and to proceed therein. By the 238th section, any officer of the Company is empowered to seize and detain any person whose name and residence shall be unknown to him who shall commit any offence against the Act, and to convey him before a justice without any warrant; and the justice is required to proceed immediately to the conviction or acquittal of the offender. Upon this Act it was argued on behalf of the plaintiff, and we think correctly, that the defendant had no authority to issue a warrant before conviction, that his authority was to issue a summons only, and that the authority to arrest in the first instance, under the 238th section, was confined to the officer of the Company, and the duty thereby imposed upon the justice was forthwith, upon the alleged offender being brought before him, to proceed to the determination of the case.

But the Act relied upon by the defendant as justifying the imprisonment was the 11 & 12 Vict. c. 43, one of the Acts called "Sir John Jervis's Acts," which is entitled "An Act to facilitate the performance of the duties of justices of the peace out of sessions, within England and Wales, with respect to summary convictions and orders." The course of proceeding upon the hearing of complaints is regulated by several sections, beginning with the 12th;

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and the 16th section enacts, that before or during the hearing of any complaint or information, it shall be lawful for the justice at his discretion to adjourn the hearing to a time and place to be appointed and stated, and in the meantime to suffer the defendant to go at large, or to commit him to, amongst other places, the House of Correction, or to discharge him upon entering into a recognizance to appear; and the form of the warrant of commitment is given in the Schedule (D.). It was upon this authority that the defendant acted, and we think it justified him. The plaintiff was brought before him under the alleged authority of the 238th section of 6 & 7 Wm. 4, c. cvi., and we do not think it material whether or not the officer of the Company was justified in detaining the plaintiff in custody under it. It seems to us sufficient for the protection of the defendant, that the plaintiff was brought before him, and information and complaint made of an offence against the Eastern Counties Railway Act, and that thereupon, by the 16th section of "Sir John Jervis's Act," he was authorized, if in his discretion he thought fit, to commit the plaintiff under the warrant to the House of Correction. The circumstance that the plaintiff had paid his fare cannot affect the authority of the justice to act upon the 16th section.

The second count was in respect of the conviction of the plaintiff on the 27th for not delivering up his ticket, and it alleges that the defendant convicted the plaintiff wrongfully, wilfully and maliciously, and without reasonable or probable cause, and that the plaintiff was thereby compelled to pay a sum of money, and that the conviction was afterwards quashed upon appeal to the quarter sessions. As to it a verdict was found for the plaintiff for considerable damages. A rule was obtained on behalf of the defendant to set aside the verdict as being against evidence, and also to arrest the judgment on the ground that the second count



discloses no legal cause of action. Upon the latter point we have bestowed much consideration, and we are not at present prepared to hold the count bad. But upon a careful perusal of the evidence, we think that the rule for a new trial ought to be made absolute; and in order that such trial may take place wholly without prejudice and in the manner the most satisfactory, we think it better to say nothing beyond this, that in our opinion it is right and proper that the case should be submitted to a second jury, but it ought to be on payment of costs by the defendant.

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The plaintiff's rule discharged.

The defendant's rule absolute for a  
new trial on payment of costs.

MARIA OLDERSHAW AND ROBERT MUSKET, Executrix and  
Executor of ROBERT OLDERSHAW v. WILLIAM THOMAS  
KING.

May 23.

THIS was a special case stated for the opinion of the Court.

The action was brought by the plaintiffs, as executrix and executor of Robert Oldershaw, to recover the sum of 731*l.* 9*s.* 3*d.* upon the defendant's guarantee.

The following guarantee was held, by Bramwell, B., and Watson, B. (dissentiente Pollock, C. B.), not to be founded on a sufficient

consideration:—"I am aware that my uncles J. and J. F. K. stand considerably indebted to you for professional business and for cash advanced to them, and that it is not in their power to pay you at present, and as in all probability they will become further indebted to you, though I by no means intend that this letter shall create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past or future transactions between you and my said uncles to a certain extent; and, therefore, in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum they may be indebted to you upon the balance of accounts at any time during the next six years to the extent of 1000*l.* whenever called upon by you to pay the same, and after twelve months previous notice.

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In August, 1848, John and Joseph Francis King being indebted to the testator Robert Oldershaw, who was their attorney, in a considerable sum of money, applied to him for further advances, which he declined to make unless he had the defendant's guarantee. The defendant, after some correspondence and two interviews with the testator R. Oldershaw, signed the following memorandum.

"21, Manchester Terrace,

"Dear Sir,

August, 24, 1848.

"I am aware that my uncles J. and J. F. King stand considerably indebted to you for professional business, and for cash lent and advanced to them, and that it is not in their power to pay you at present, and as in all probability they will become still further indebted to you, though I by no means intend that this letter shall create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past or future transactions between you and my said uncles to a certain extent, and therefore in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum they may be indebted to you upon the balance of accounts between you at any time during the next six years, to the extent of 1000*l.*, whenever called upon by you to pay the same, and after twelve calendar months previous notice.

"To Robert Oldershaw, Esq.

"I remain, &c.

WILLIAM THOMAS KING."

The above guarantee was handed to the testator Robert Oldershaw on the 25th of August, 1848, on which day he advanced to John and Joseph Francis King 170*l.* Previously thereto he had advanced to them 513*l.* in money. After the 25th of August, 1848, he paid to John and Joseph

Francis King various sums, amounting in the whole to 520*l*. The transactions went on till the 10th of July, 1849, when John and Joseph Francis King became bankrupts. At the date of the fiat there was due from the said John and J. F. King to the testator Robert Oldershaw 2184*l*. 16*s*. 4*d*.

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After the realization of the securities in the hands of the testator, and the receipt of a dividend under the estate of John and J. F. King, there remained due to the plaintiffs, as executrix and executor of the said Robert Oldershaw, who died in May, 1851, the sum of 731*l*. 9*s*. 3*d*.; and on the 6th of June, 1854, the plaintiffs gave notice to the defendant that the said sum of 731*l*. 9*s*. 3*d*., was due and owing and requested him, under the terms of his guarantee, to pay the amount of the same to them.

It is agreed between the parties that all things necessary to be done, and all conditions precedent, have been performed and fulfilled, and all times have elapsed necessary to enable the plaintiff to recover the said sum of 731*l*. 9*s*. 3*d*., provided the Court shall be of opinion that the defendant, under the said memorandum and facts above stated, is liable to pay the same.

The questions for the opinion of the Court are: First, whether, on the above facts, the defendant is liable or not: and Secondly, to what extent.

*Knowles* (with whom was *W. M. Cooke*) argued for the plaintiff in last Michaelmas Term (Nov. 10).—This guarantee appears to have been made upon a sufficient consideration, namely, future advances. The testator was “to forbear to press for the immediate payment” of the debt then due to him. In consideration of such forbearance, and of the testator’s continuing to make such advances as he thought fit, but which advances he was not compelled

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to make, the defendant agreed to guarantee the payment of any sum in which J. and J. F. King might be indebted to him on the balance of accounts at any time during the next six years. The words "as in all probability they will become further indebted to you," shew that the motive operating on the guarantor, in other words, the consideration, was not only the not pressing for payment, but the further loans contemplated. In order to make the consideration sufficient it is not necessary to shew that the testator was bound to make further advances. It is enough if the obligation is conditional upon the further advances being made. Here, that condition having been fulfilled, the guarantee became binding. It appears on the face of the case, that the testator would not have made the further advances unless the guarantee had been given. [*Alderson*, B.—The defendant consents to be liable to the extent of 1000*l*., and it appears that at the time of the guarantee a much less sum was due.] That shews that future advances were contemplated, which is the consideration to be collected from a perusal of the whole letter. In *Bell v. Welch* (a), the Court in putting a construction on the terms of the guarantee, laid stress on the amount due at the time it was given.—Secondly. "The forbearing to press for immediate payment of the debt" is a sufficient consideration to support the promise. A reasonable construction must be put upon the words. It is a question of fact whether the testator did press for immediate payment. Waiting for a very short time, such as an hour, might be an illusory forbearance. But the Court will not entertain any question as to the adequacy of the consideration. Indeed, forbearance for a day, or even a less time, might be a matter of importance to the parties. The word "immediate" need not be construed literally: *Page v. Pearce* (b). [*Alderson*, B.—

(a) 9 C. B. 154.

(b) 8 M. & W. 677.

"Pleading immediately" means pleading in twenty-four hours.] In *Mapes v. Sidney* (a) a promise in consideration that the defendant would forbear, with an allegation that the plaintiff did forbear *per magnum tempus*, was held good. [Alderson, B.—Here the word immediate shews that the forbearance is not to be perpetual.] It is enough if it amounts to an agreement to suspend the remedy. In *Payne v. Wilson* (b), an agreement to pay a sum of 30*l.* on the 1st of April, in consideration that the plaintiff would "suspend proceedings," was held to be binding.

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*Petersdorff*, for the defendant.—First, the document in question is a mere proposal or offer to guarantee, and must be accepted in order to bind the defendant: *M'Iver v. Richardson* (c), *Mozley v. Tinkler* (d). [Bramwell, B.—The letter appears to be, not a proposal, but the result of a previous arrangement.]—Secondly, assuming the document to be a guarantee, there is no sufficient consideration to support it. An express consideration is stated on the face of the instrument, viz., forbearance; and therefore no other consideration can be implied by law. But forbearance for a long, or a short, or for some time, is not a good consideration to support a promise; it must be an absolute forbearance, or for a definite time: Com. Dig. Action upon the Case upon Assumpsit (B) (B 1). In *Mapes v. Sidney* (a) the consideration was forbearance to sue for a debt, and that was held good, two of the Judges being of opinion that it should be intended a total and absolute forbearance. *Semple v. Pink* (e) shews that forbearance generally, or for a reasonable time, is not a sufficient consideration. *Bell v. Welch* (f) is also an autho-

(a) Cro. Jac. 683.

(b) 7 B. &amp; C. 423.

(c) 1 M. &amp; Sel. 557.

(d) 1 C. M. &amp; R. 692.

(e) 1 Exch. 74.

(f) 9 C. B. 154.

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ality in the defendant's favour. It is argued that the guarantee contemplates future advances, and therefore there is a sufficient consideration on the face of it. But its terms exclude any intention that future advances should form part of the consideration. If the entire consideration consists of forbearance *and* future advances, it would be necessary for the plaintiff, in declaring on the guarantee, to allege forbearance. But forbearance being expressly stated as the consideration, future advances cannot be incorporated as part of it. [*Watson*, B., referred to *Wood v. Benson* (a).]

*Knowles*, in reply. Forbearance to press for *immediate* payment is a good consideration. In *Payne v. Wilson* (b) it was held that a consent to stay proceedings on a cognovit was a sufficient consideration to support a promise to pay the debt: *Littledale*, J., there said, that after verdict it must be taken that the proceedings were suspended absolutely, or for a reasonable time. [*Pollock*, C. B., referred to *Raikes v. Todd* (c).] At all events the future advances form a good consideration.—He also referred to *Mechelen v. Wallace* (d).

*Cur. adv. vult.*

The Court having differed in opinion the following judgments were now delivered.

BRAMWELL, B.—My brother *Watson* and myself are of opinion that the defendant is entitled to judgment. The consideration mentioned for the defendant's promise is forbearing to press for the immediate payment of the debt now due; and this in our judgment is void for uncertainty. The authorities which have been referred to shew that a guarantee in consideration of forbearance "for some time,"

(a) 2 C. & J. 94.

(c) 8 A. & E. 846.

(b) 7 B. & C. 423.

(d) 7 A. & E. 49.

or "a little time," is void. In the present case, the word is "immediate." That cannot mean "instantaneous," and anything beyond is uncertain. It was argued that, no time being named, it was to be taken to be, that a reasonable time was intended. That is not so, as it is to "forbear to press for immediate payment;" not forbear for a reasonable time. However, assuming it were so, that is equally vague and uncertain. In the result, one may be able to say in each particular case if the creditor has waited a reasonable time; but it is impossible to lay down a rule as to what does or does not constitute such a time between a debtor and creditor; and accordingly it was so held in *Semple v. Pink* (a), where the reasoning of Baron *Alderson* and the remark of Baron *Rolfe* are to the effect that such a guarantee, as stated in the declaration in that case, is void for uncertainty. Then, whether this consideration be read to be to forbear for a reasonable time, or to forbear to press for immediate payment, it is void. *Mapes v. Sidney* (b) will not help the plaintiff on either ground of its decision, for here the agreement to forbear is not absolute, nor is Lord *Hobart's* reason applicable, as the consideration for the agreement must now be in writing.

But it was said that the guarantee contemplated the possibility of future advances, and that as a guarantee saying "I will pay anything you advance to A.," without saying why, would be good; and as it appears by *Wood v. Benson* (c) that a guarantee may be good for a future, and bad for a past, debt, so may this guarantee be good for the future, though not for the past debt. But we are of opinion that as the consideration expressly mentioned is forbearance, the promise cannot (as in the case cited) be referred to what otherwise no doubt might, by necessary implication, be taken to be the consideration. It is clear that if the gua-

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(a) 1 Exch. 74.

(b) Cro. Jac. 683.

(c) 2 C. &amp; J. 94.

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rantee had been "in consideration you will forbear for a month," that would be at least a part of the consideration, and performance of it would have had to be averred, as of a condition precedent; and it is not the less so here because the consideration is void for uncertainty. Again, the agreement is to pay the sum due "on balance of accounts," so that the defendant was to be liable for nothing other than a sum in which the old debt was taken into account.

We are of opinion, therefore, that the plaintiffs are not entitled to recover, and we cannot help adding, that though we doubt not that the intention of the testator was perfectly fair, as indeed is shewn by the indulgence he gave, and that he desired not to tie himself up, only because of the loss which might thereby accrue, still that he did endeavour to get a binding promise without giving any consideration for it, and in reality fails in consequence. What the defendant substantially bargained for was forbearance to the principal debtor, and to this he never had a right, though it was granted in fact.

POLLOCK, C. B.—I regret very much that I am compelled to differ from the rest of the Court, but it appears to me that the plaintiff is entitled to our judgment, and this whether we look at the authorities on the subject or at the reasonable construction which is to be put on the letter of guarantee with reference to the whole matter to which it relates. (His Lordship then read the guarantee.) I think a mercantile instrument such as this is, ought not to be read and construed with the strictness with which a declaration or plea might be. We ought (in my judgment) to see whether the parties have so expressed themselves as to shew that there was a guarantee, and for what, and upon what consideration. By the Statute of Frauds such an undertaking must be in writing, and I do not intend to



question the case of *Wain v. Warlters* (a), that the consideration for the promise must appear as well as the promise itself, but, as there is in reality a consideration in this contract which is not expressed, it appears to me that effect ought to be given to it, so that the agreement between the parties should be carried into effect. The defendant undoubtedly intended to promise something, and for a consideration. On the faith of that promise the plaintiff has advanced money and given credit, and I think, unless we are compelled by reason or authority to decide against the plaintiff, we ought to give effect to what undoubtedly was intended between the parties. It is said that a consideration being expressed, we must take what is expressed to be the real, true and only consideration, and that we cannot notice any other that is not expressed. I do not feel the force of that remark, and the rather because the consideration expressed is said to be no consideration at all; had there been no consideration expressed at all, it is clear from several cases (which it is unnecessary to cite) that the advance of money and the incurring of a further debt would (though not expressed) have been a good consideration for the promise to pay the debt arising out of such future transactions. I cannot see the good sense or the justice of at the same time deciding that the consideration stated is no consideration, and therefore will not support the promise, and yet it is sufficient to prevent us from looking at the agreement and seeing that it contains a real, substantial and good consideration, upon which the promise (at least as far as future transactions are concerned) may be enforced. It seems to me not to be good law, or logic, to say that it is a consideration and that it is no consideration, and this to defeat the real and honest intention of the parties (of one of them at least); and it seems to me we

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(a) 5 East, 10.

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ought to construe the agreement “ut res magis valeat quam pereat;” and if what is stated to be the consideration is no consideration at all, we ought to see whether there is not another consideration which will render the agreement sensible and available quoad future dealings (at least). In the case of *Johnston v. Nicholls* (a) the guarantee was in these words: “As you are now about to enter upon transactions in business with C., with whom you have already had dealings, in the course of which C. may from time to time become largely indebted to you; in consideration of your doing so I hereby agree to be responsible to you for, and guarantee to you the payment of, any sums of money which C. now is, or may at any time be indebted to you, so that I am not called upon to pay more than the sum of 2000*l*.” There the only consideration expressed was, *entering upon transactions*, not saying for how long; here the consideration expressed is *forbearing to press for immediate payment*. In the case cited *Maule, J.*, held the consideration to mean substantially that the plaintiffs *would continue the dealings*; so here *forbearing to press for immediate payment* really means *allowing the account to go on*, or allowing the dealings to continue, and the Court held that the consideration was sufficient to support a promise to pay the past debt, as well as any future debt to be incurred. *Cresswell, J.*, took the same view of the consideration, which he held to be *continuing to have dealings*, in which *Erle, J.*, concurred: (see also the case of *Russell and Another v. Moseley* (b).)

With respect to so much of the consideration as arose out of future advances and dealings, I am of opinion that what is necessarily implied from the writing is to be dealt with as if it *was actually there expressed*

(a) 1 C. B. 251.

(b) 3 B. & B. 211.

*in words at length*; the implication is not one of law it is one of fact. It is a necessary implication of fact arising out of the transaction and the language used respecting it. Where the law would imply a contract, that shall not prevail against an express contract: but it is not implied *by law* that the future advances, if made, shall be the consideration for a promise to pay them by a third person. It is implied as a necessary conclusion, not of law, but of fact, that that is what the parties meant, and that it is so clear, manifest and obvious that there is no occasion to express it. I think, therefore, the document is to be read thus—as to past debts, in consideration of your forbearing to press for immediate payment, and as to future dealings, in consideration of your continuing these dealings and making advances, if you shall make them, which you are not bound to do, I hereby undertake, &c. ; or else—as to past debts and future advances, in consideration of your forbearing to press for immediate payment, and allowing the account to go on, I undertake to pay the balance, consisting of either, not exceeding 1000*l*. Suppose a guarantee were in these words,—“I undertake without any consideration to pay for any goods you may supply to J. S., from the date of this,”—and the goods were furnished to J. S., could it be successfully contended that the party giving the promise would not be bound to pay for them on the ground of there being no consideration? I am of opinion in the negative, and “without any consideration” would be construed to mean without any other consideration than what arises out of the transaction itself.

I am therefore, without any doubt, of opinion, that effect ought to be given to this guarantee in respect of the advances made and the debts contracted since the date of the guarantee, and I incline to think that effect ought to be given to it as to the whole claim, but as the majority of

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the Court is of a different opinion the judgment must be for the defendant.

Judgment for the defendant (a).

(a) Judgment reversed in the Exchequer Chamber: See *post*, p. 517. The consideration for the promise need not now appear on the face of the guarantee, 19 & 20 Vict. c. 97, s. 3.

May 28. BELL and Another, Assignees of FAIRBARN, a Bankrupt, v. SIMPSON.

A sale by a trader in insolvent circumstances, and on the eve of bankruptcy of his stock in trade and the bulk of his property to one of his creditors, the consideration being in part an old debt, is not *per se* an act of bankruptcy though the effect is to stop the trading.

TROVER.—Pleas: Not guilty.—Not possessed.

At the trial, before *Martin, B.*, at the London sittings after last Easter Term, it appeared that Fairbarns, a coffee-house keeper, being deeply indebted to various persons, was applied to, on the 22nd of October, by the defendant for payment of a debt of 50*L*. due to him. He ultimately agreed to sell to the defendant the fixtures, fittings up, furniture and effects in the coffee-house, which appeared to be the whole of his property with the exception of some bedding, for the sum of 120*L.*, 70*L*. of which was paid in cash, the remaining 50*L*. being the debt due. A bill of sale was executed on the same evening. Fairbarns then left the premises, his family having already done so, and he was adjudged a bankrupt on the 31st of October.

The plaintiffs' counsel contended that there was evidence to shew that the bill of sale was a conveyance of the whole of the bankrupt's property, and amounted to an act of bankruptcy and a fraudulent preference. The learned Judge nonsuited the plaintiffs, reserving to them leave to move to enter a verdict for 120*L.*; the Court to be at liberty to draw inferences of fact.

*O'Malley* now moved accordingly.—The effect of the sale in the present case was to stop the trade. The consideration, though in part a present payment, is in part a by-gone debt. The conveyance necessarily defeated and delayed creditors, and is therefore an act of bankruptcy. *Graham v. Chapman* (a) is an authority in favour of the plaintiff. In *Lindon v. Sharp* (b) the defendant had made further advances, but notwithstanding that, the conveyance of all the trader's property, in consideration of a pre-existing debt, was held to be an act of bankruptcy. [*Pollock*, C. B.—It cannot be inferred from *Graham v. Chapman* (a) that a present advance is not available. The Court held the deed to be an assignment of everything without securing any present advantage to the bankrupt.] Where a man gives a security which extends over the whole of his property, for a consideration which is in part an antecedent debt, that is an act of bankruptcy. [*Pollock*, C. B.—That is contrary to *Young v. Waud* (c).]—He referred also to *Porter v. Walker* (d) and *Leake v. Young* (e).

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*Cur. adv. vult.*

POLLOCK, C. B., now said.—In this case a bankrupt, immediately before his bankruptcy, had sold a considerable quantity of his property, and the payment for it was in part by the extinction of an old debt. It was contended that this was *per se*, as a matter of law, an act of bankruptcy. But we think that there is no foundation for that proposition. If a sale of the bulk of a trader's property is absolute and *bonâ fide*, and there is no intention on the part of the buyer to commit a fraud upon the bankrupt or his creditors,—if there is no fraudulent preference, or fraudulent sale or

(a) 12 C. B. 85.

(d) 1 Man. &amp; G. 686.

(b) 6 Man. &amp; G. 895.

(e) 5 E. &amp; B. 955.

(c) 8 Exch. 221.

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delivery, but the matter is perfectly honest, and not intended to contravene the bankrupt laws (which are questions not of law, but of fact), the sale is not an act of bankruptcy. In the present case it was left to us to draw conclusions of fact, and we are of opinion that the transaction was *bonâ fide*. Therefore there ought not to be a rule. I do not think it necessary to go through the cases; in truth, there is no case that supports the doctrine which Mr. *O'Malley* propounded.

Rule refused (a).

(a) See *Hale v. Allutt*, 18 C. B. 505.

June 2.

THOMPSON and Others v. ROBSON and Others.

An application, under the 50th section of The Common Law Procedure Act, 1854, for an order that the opposite party answer on affidavit, stating what documents he has in his possession relating to the matters in dispute, &c., will not be granted where it is not shewn that such documents would be evidence for the applicant.

*Semble*, that it is necessary to shew that the documents exist, or at least to identify the particular documents asked for.

THIS was an application founded on the 50th section of the Common Law Procedure Act, 1854, for an order that the defendants should answer on affidavit stating what documents they had in their possession or power relating to the matters in dispute, or what they knew as to the custody thereof, and whether they objected to the production of such as were in their possession or power.

The declaration stated that the plaintiffs required a ship as a passenger vessel to ply between London and Norway; that they agreed to hire from the defendants the "*Janet Croll*" for a time and at a price mentioned, and the defendants agreed to paint the said ship, and to place her at the plaintiffs disposal on a certain day, in good repair and properly fitted and equipped for the purpose, but that the defendants did not cause her to be painted, and handed her over to the plaintiffs out of repair, without proper fittings and equipments, in a dirty condition, and swarming with

vermin.—There were pleas denying the contract, and the breaches; on which issues were joined.

The application was founded on an affidavit by the plaintiff Thompson, who swore that he believed that, in the course of the negotiation with respect to the charter-party and the vessel, the defendants wrote instructions to Lockwood, the ship's husband, and that the defendants also received letters from Lockwood, touching the ship and the chartering of her to the plaintiffs, and that the defendants kept copies of such letters; that they had in their possession bills and receipts for repairs done to the said vessel about the time when the said charter-party was entered into, and letters written by the captain during the voyage to Norway and back, and copies of letters written by Lockwood to the captain; that they had made memoranda in their books relating to the charter-party, such as are usual to be made in the management of business; that it was material and necessary for the plaintiffs, in order to support their claims on the trial, and to prepare for trial, to have such letters, &c., and that he verily believed that the said books, letters, &c., were in the possession of the defendants.

*Horace Lloyd*, in support of the application.—The application is in the nature of a bill of discovery. In that respect it supplies the defect of the 14 & 15 Vict. c. 96, s. 6. The object is to enable the applicant to get a list of documents, that he may consider whether he is entitled to inspect and take copies of them. [*Martin, B.*—What right has a plaintiff to the production of documents which cannot be evidence for him?] Some of them, as for instance the painter's bill, may be evidence. According to the present practice in courts of equity, the bill charges that the defendant has documents relating to the matters

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in dispute, which are scheduled in the answer (a). The plaintiff then moves for the production of such of them as he thinks fit.—He referred also to *Forshaw v. Lewis* (b).

POLLOCK, C. B.—We cannot grant a rule calling on the defendants to give a list of documents, which is a mere attempt to fish out evidence to make a case. A proper foundation must be laid for the application; the Court must see that inspection is required for the purposes of justice.

MARTIN, B.—I am inclined to construe the enactment liberally, but to grant this application would be very mischievous. The action is brought for the breach of a covenant in a charter-party; whether that covenant has been broken does not depend on written documents. The only thing which the documents could shew, would be whether the defendants knew that the ship was in a dirty state. That is a mere matter of prejudice. We cannot compel a person to go through all the documents in his possession for a purpose of that sort.

BRAMWELL, B.—I am of the same opinion. It must be borne in mind that searching for documents is often troublesome and expensive. It was pointed out in *Bray v. Finch* (c) that the application must be founded upon the affidavit of the party of his belief “that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party.” It would be strange if a man could say, “I do not know whether there are any documents, but if so I am entitled to a discovery of them.” The form of affidavit

(a) 4 Daniell's Chancery Practice, by Headlam, 3rd edit., pp. 508, 590.

(b) 10 Exch. 712.

(c) 1 H. & N. 468.



required by the section in question supposes that documents are in the possession of one party, to the production of which the other is entitled. That assumes that the documents exist. However, I do not say more than that it is necessary to identify the particular document asked for. Now, it is clear that this affidavit does nothing of the sort, but only states the plaintiff's belief that there are such documents. I agree with my brother *Martin* that the captain's letters to the owners would not be evidence of the fact that the vessel was in a dirty state.

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WATSON, B.—The enactment of the 50th section is a very beneficial one, but we must take care that applications under it are not made the means of creating embarrassment and expense. The present action is brought against the shipowner for not providing a ship in proper repair, according to a charter-party. Without shewing that there are any bills for repairs or letters relating to that question, the plaintiffs ask the defendants to go through their bills, and all the letters and copies of letters in their possession written to or by the ship's husband and captain, relating to this matter. This is clearly a case in which there is no foundation for a discovery.

Rule refused.

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May 30.

## THE ATTORNEY GENERAL v. JOHN HOLLINGWORTH.

By agreement made in 1794, 8000*l.* stock was transferred by O. to H., upon the terms that H. should repay the money produced by the sale of it or replace the stock at the option of O., and in the mean time pay interest at the rate of 5 per cent.; the loan was secured by bond, mortgage, and a deed of covenant. O. and H. being dead, E. O. being the legatee and heiress, but not the personal representative of O., and J. H. being the devisee of H., J. H. applied to E. O. to assist him to raise money, which E. O. agreed to do on having a security for the replacement of the stock. E. O. accordingly assigned the bond mortgage, and

**I**NFORMATION for penalties for non-payment of legacy duty.—Plea: Nil debet.

A special verdict was taken by consent, which stated (in substance) that in May, 1794, Thomas Ollive, in order to enable him to lend to Finch Hollingworth and T. R. Hollingworth the sum of 5640*l.*, to be secured by bond, &c., transferred to the said F. Hollingworth and T. R. Hollingworth 8000*l.*, 3 per cent. consols; that F. Hollingworth and T. R. Hollingworth sold the stock, which produced 5640*l.*: that, previous to the transfer, F. Hollingworth and T. R. Hollingworth agreed to transfer to T. Ollive, his executors, &c., 8000*l.*, 3 per cent. consols, whenever requested to do so, which transfer was to be taken in satisfaction of the said sum of 5640*l.*: that on that day and year aforesaid, F. Hollingworth and T. R. Hollingworth delivered to T. Ollive their bond for the payment of 5640*l.*, with interest after the rate of 5*l.* per cent. per annum, and also conveyed to T. Ollive, by way of mortgage, certain hereditaments, with a proviso for redemption on payment of 5640*l.*, with interest at 5*l.* per cent. per annum; and by another indenture F. Hollingworth and T. R. Hollingworth covenanted that they would, when requested, transfer 8000*l.* 3*l.* per cent. consols, in place of the said sum of 8000*l.* 3*l.* per cent. consols, and T. Ollive agreed to accept the same in satisfaction of the 5640*l.* secured by the

deed of covenant of 1794, to H. and P., by way of mortgage, to secure an advance to J. H., and in consideration thereof, J. H., in 1842, by indenture, conveyed to E. O. the premises comprised in the original mortgage, together with other lands, by way of mortgage, with a proviso and covenant to secure the transfer to E. O. of 8000*l.* stock. E. O. died, and by her will forgave the mortgage debt of 1842 to J. H.—*Held*, that the mortgage and covenant of 1842 were not so connected with the illegal agreement of 1794 as to be usurious and void; and that therefore legacy duty was payable on the bequest.

bond. That on the 2nd of January, 1817, T. Ollive made his will, by which he appointed Richard Stileman executor, and bequeathed to Elizabeth Ollive all his personal effects, and died leaving Elizabeth Ollive his heiress at law; that probate of the said will was granted to R. Stileman, who then assented to the bequest to Elizabeth Ollive; that T. R. Hollingworth died in 1826, having devised his undivided moiety in the premises comprised in the mortgage of 1794 to Thomas Hollingworth and John Hollingworth of Maidstone; that Finch Hollingworth died in 1838, having devised his moiety of the mortgaged premises to John Hollingworth, the defendant. That on the 29th of September, 1841, by indenture between Elizabeth Ollive of the first part, John Hollingworth, Thomas Hollingworth, and John Hollingworth of Maidstone, of the second part, and W. W. Hastings and W. H. Palmer of the third part, reciting that the Hollingworths had applied to Hastings and Palmer to lend them 5200*l.*, which they had agreed to do, upon the terms that Elizabeth Ollive should assign and transfer the 8000*l.* 3*l.* per cent. consols due to her, and the several securities for the same, to Hastings and Palmer, Elizabeth Ollive, in pursuance of that agreement, and in consideration of 5200*l.* paid to the Hollingworths, did bargain, sell, and transfer the said 8000*l.* 3*l.* per cent. consols, and all bonds, covenants and agreements entered into by F. Hollingworth and T. R. Hollingworth for the transfer and payment of the same, to hold to Hastings and Palmer subject to a proviso for redemption on payment of 5200*l.* and interest. That in January, 1842, by indenture reciting that upon the occasion of the said Elizabeth Ollive having agreed to execute the indenture of September, 1841, it was agreed between her and John Hollingworth, Thomas Hollingworth, and John Hollingworth of Maidstone, that they should execute that indenture for the purpose of

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securing to Elizabeth Ollive the transfer of the said 8000*l.* 3*l.* per cent. consols, John Hollingworth, Thomas Hollingworth, and John Hollingworth of Maidstone, each in respect of his share thereof, granted, bargained, sold, released, &c., to Elizabeth Ollive the hereditaments originally conveyed by way of mortgage by the indenture of 1794, and also other hereditaments not comprised in the last mentioned indenture, to hold to Elizabeth Ollive, her heirs, &c., subject to a proviso for redemption in case John Hollingworth, Thomas Hollingworth, and John Hollingworth of Maidstone should, on the 23rd of December, 1842, transfer 8000*l.* 3*l.* per cent. consols in the books of the Bank of England into the name of Elizabeth Ollive, and should in the meantime pay to Elizabeth Ollive such sums of money as should be equivalent to the dividends of 8000*l.* 3*l.* per cent. consols; with a covenant by John Hollingworth, T. Hollingworth, and J. Hollingworth of Maidstone, that they would transfer the stock, and in the meantime pay the said sums by way of dividends. That in 1844 Elizabeth Ollive made her will, and thereby "gave and forgave to the said John Hollingworth one moiety of the debts and liabilities then owing, or which at the time of her death might be owing to her from him, jointly with any other person, upon bond or mortgage," and she gave and forgave to Thomas Hollingworth and John Hollingworth of Maidstone the other moiety of the said debts and liabilities. Elizabeth Ollive died in 1852, and her will having been proved by the executor, he assented to the said gift and release from the liability created by the indenture of 1842 to John Hollingworth, Thomas Hollingworth, and John Hollingworth of Maidstone; that the value of the gift to John Hollingworth is 3500*l.*; that no legacy duty has been paid, and if the gift is liable to legacy duty, such duty is 210*l.*; but whether or not upon the whole matter the

said John Hollingworth does owe, the jurors are ignorant, &c.

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*The Attorney General* (with whom were *Pigott*, Serjt., and *Beavan*), for the Crown.—The question is, whether Elizabeth Ollive had a debt due to her which could be enforced, or whether the debt forgiven was illegal, and not enforceable as being tainted with usury. In the case of *Barnard v. Young* (a), it was held by Sir *William Grant* that a contract for repayment of a debt with interest at 5l. per cent., or at the option of the creditor to transfer so much stock as the money lent would have produced on the day it was paid, was usurious. It is not necessary to dispute the decision in that case. Assuming the original securities given by F. Hollingworth and T. R. Hollingworth to Thomas Ollive to have been illegal (b), the indenture of 1842 was a valid instrument. Elizabeth Ollive having a claim to the mortgaged premises, and being beneficially interested in all the securities given for the original debt, but not being the personal representative of Thomas Ollive, and the three Hollingworths being devisees of the equity of redemption, but not being personally liable on the covenants, Elizabeth Ollive agreed with them to postpone her mortgage debt, and to assign her securities to Hastings and Palmer to secure an advance by them to the three Hollingworths. In consideration of that agreement the three Hollingworths agreed that the premises conveyed by the mortgage deed of 1794, together with other premises not comprised therein, should stand as security for 8000l. stock to be transferred. The premises were accordingly

(a) 17 Ves. 44.

(b) *Martin*, B., pointed out in the course of the argument, that the special verdict did not find

that the transfer of stock by Thomas Ollive, in the present case, was a loan of money.

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conveyed subject to a new proviso and a new covenant, which were legal. The covenant in question had no connection with the original illegal transaction. If an action had been brought upon it, the illegality of the agreement of 1794 could not have been pleaded as an answer to it. It is founded on a good consideration. After Elizabeth Ollive had taken the mortgage of 1842, she held the premises subject to the proviso in that deed, and the old proviso was at an end. She could not have sued on the old covenant, because the right of action on that was in the personal representative of Thomas Ollive. E. Ollive could have established her right at law on the new covenant without requiring any aid from the original illegal transaction. That is the test, whether a subsequent contract can be enforced or not: *Simpson v. Bloss* (a); *Fivaz v. Nicholls* (b).

*Bovill* (with whom was *Manisty*), for the defendant.—The general rule of law is, that if parties enter into an usurious agreement, no remote security for any part of the illegal interest or to enforce the tainted contract, (there being no express agreement to expunge the original bad part of the debt) can be enforced, although such new security be founded on a new settlement of accounts. That doctrine may be collected from *Pickering v. Banks* (c); *Tate v. Wellings* (d), and *Chapman v. Black* (e). [*The Attorney General* referred to *Barnes v. Hedley* (f).] Here, as in *Fisher v. Bridges* (g), the covenant “springs from and is a creature of the original illegal agreement.” The person interested under the illegal deeds of 1794 exercised the option reserved to her by the original illegal agreement, and the deed of 1842 is a security for the transfer of 8000*l*.

(a) 7 Taunt. 246.  
 (b) 2 C. B. 501.  
 (c) Forrest, 72.  
 (d) 3 T. R. 531.

(e) 2 B. & Ald. 588.  
 (f) 2 Taunt. 184.  
 (g) 3 E. & B. 642.

stock, which she thus elected to take. The new security is in fact a continuation and carrying out of the original illegal contract.

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POLLOCK, C. B.—We are all of opinion that the Crown is entitled to judgment. The facts were as follows: There was a loan of 8000*l.* stock, and certain securities, that is to say a bond, a mortgage, and a deed of conveyance given for it, which were void at the time they were granted, on the ground that the agreement for the loan was usurious. Subsequently one moiety of the mortgaged premises having come to John Hollingworth, and another moiety to Thomas Hollingworth and John Hollingworth of Maidstone, there was an arrangement for a further advance to the Hollingworths, and an agreement was come to between Elizabeth Ollive, who had become entitled to the original debt, and the Hollingworths, by which, on Elizabeth Ollive postponing her claim under the original securities, the Hollingworths agreed to transfer the sum of 8000*l.* stock to Elizabeth Ollive on a certain day, and in the mean time they covenanted to pay the dividends on the stock. Certain estates were conveyed to her by way of mortgage as a security for the transfer of the stock. Elizabeth Ollive made her will, leaving a moiety of the debt to John Hollingworth, and the question is, whether he is liable to pay legacy duty. The covenant in the deed of 1842, by which the Hollingworths agreed to transfer the 8000*l.* stock originally lent, was legal and capable of being enforced. It constituted a legal debt, and therefore the Crown is entitled to legacy duty on the bequest of it by Elizabeth Ollive. I do not rely on any doubt that may be raised as to the illegality of the original agreement, and I lay no stress upon any question whether usury can be set up in a case like the present against the

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Crown. It is clear that if Elizabeth Ollive had been alive and had sued upon the covenants in the indenture of 1842, the defendant would have had no answer in law.

MARTIN, B.—I am of the same opinion. Assuming that the agreement of 1794 was illegal, that would be no answer to an action on the covenants in the deed of 1842. The Hollingworths required to borrow money; they asked Elizabeth Ollive to join them in giving security; she did so on the understanding that they would execute the indenture in question; the security given in pursuance of that understanding is free from the taint of usury. If a mortgagee in possession by a title tainted with usury agrees to join in making a clear and perfect title to a third person, there is nothing to prevent that from being a valid consideration for an agreement by the mortgagor to give a new and legal security. No plea could be framed which would impeach the new agreement. The consideration for that is not a loan at all. The cases cited have therefore no application. In *Pickering v. Banks* (a) a warrant of attorney had been given for money due upon an usurious bill. In *Chapman v. Black* (b) a new bill was given in exchange for an old one, which was tainted with usury, but a bill of exchange is a simple contract, to the validity of which a consideration is necessary. The decision might have been otherwise if the new security had been by bond. Lord *Kenyon's* dictum to the contrary in *Tate v. Wellings* (c) is extra-judicial. In *Fisher v. Bridges* (d) the deed was given to secure the payment of the illegal debt.

WATSON, B.—I am also of opinion that the Crown is entitled to the duty. It appears on the face of the deeds of

(a) Forrest, 72.

(b) 2 B. & Ald. 588.

(c) 3 T. R. 530.

(d) 3 E. & B. 642.



1794 that there was a loan upon an usurious agreement, and a mortgage of certain estates by way of security. In 1842 Elizabeth Ollive had become entitled to the money, and the Hollingworths entitled to the equity of redemption in the estates in question, but they were not liable to any action at the suit of Elizabeth Ollive. The Hollingworths wanting money, and wishing to make a perfect security to the lenders, applied to Elizabeth Ollive to assist them to make a title, and arrangements were made, in pursuance of which a new mortgage was made, including fresh estates. The object of that was to get rid of the usurious security. The rule laid down in the case of *Simpson v. Bloss* (a) is, that when a demand connected with an illegal transaction can be sued on without the necessity of having recourse to the illegal transaction, the plaintiff can maintain an action; but wherever it is necessary to resort to the illegal transaction to make out a case upon the new security, the new security cannot be enforced. Before the recent statutes, bills given in lieu of other bills tainted with usury could not have been enforced; but if the usurious contract had been abrogated and a new contract made for payment of the original debt, with legal interest, that contract was valid: *Barnes v. Hedley* (b). In *Fisher v. Bridges* (c) the new covenant worked out the original illegal contract.

Judgment for the Crown.

(a) 7 Taunt. 246.

(b) 2 Taunt. 184.

(c) 3 E. & B. 642.

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May 28. **ELLIS v. THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.**

A railway crossed an occupation way which connected lands of the plaintiff lying on each side of the railway, and which was also a public footway. The crossing being on the level, at the point of intersection the Railway Company put up high gates of which they gave a key to the plaintiff. The gates obstructed the footway, but the Company did not make a bridge over the railway, or provide a stile for foot passengers in pursuance of 8 & 9 Vict. c. 20, ss. 46, 61, 68. The key having been lost, one of the gates was left open, and some colts of the plaintiff having escaped on to the railway were killed by a passing train.—

*Held*, that it was a question for the jury, whether the plaintiff by his own negligence had contributed to the accident.

*Seemle*, that if the fence of a railway obstructs a way, it is the duty of persons having a right to use the way not to prostrate the gates in order to abate the obstruction, but to seek their remedy in a Court of law.

THE declaration stated that the defendants, under and by virtue of "The Guildford Extension and Portsmouth and Fareham Railway Act, 1845," by and with the authority of three-fifths of the proprietors of the London and South Western Railway Company, present, &c., purchased, &c., and the Company, by the said Act incorporated, by and with the like authority, &c., sold and transferred the whole of the undertaking by the said Act authorized, before the completion thereof, to the defendants, who thereupon proceeded to make and complete the railway, &c.: that the railway so authorized to be made, when made and completed, crossed a certain public highway, &c., not being a public carriage road, and not then being one of the several public roads in the said Act mentioned, &c.: that the defendants, after the passing of the Railway Clauses Consolidation Act, 1845, wrongfully and unlawfully, &c., and without such consent of two or more justices in petty sessions, as in the said Act mentioned, made and carried the railway across the said public highway on the level, contrary to the statute in such case made and provided, and did not carry the said public highway over the said railway, or the said railway over the said public highway, by means of a bridge, according to the statute, &c.; and by reason of the premises, &c., two colts of the plaintiff passed out of the said public highway into and upon the railway, and were then run

over and killed by a certain locomotive engine, &c., of the defendants, then travelling along the railway.—Second count: That the defendants carried the railway across a certain public highway for foot passengers on the level, but did not erect good or sufficient gates or stiles on each side of the railway where the highway communicated therewith, but, on the contrary thereof, maintained bad gates only, and by reason of the premises two colts passed on to the railway and were killed.—Third count. (Similar to the second, but describing the way as a bridle way).—Fourth count: That the defendants were the owners and occupiers of the railway, &c., and possessed of certain locomotive engines, &c.; that the railway ran over land taken for the use of the same under the provisions of the statute in such case made; that the plaintiff was possessed of colts lawfully being, &c., in certain land of the plaintiff adjoining the railway, &c.; that there was a public highway not being a carriage way, &c., across the land of the plaintiff and across the railway, &c., which crossed the railway on the level, and thereupon it became the duty of the defendants to make and at all times maintain a sufficient fence for separating, &c., and for protecting the cattle of the plaintiff from straying thereon by reason of the railway, together with all necessary gates and all necessary stiles; that the defendants did not make or maintain a sufficient fence with all necessary gates, but on the contrary erected and maintained, by way of such fence, a high gate only, and did not make or maintain such a stile as was necessary for passengers using the highway, and thereby obstructed the highway, and by reason of the premises certain persons, for the purpose of removing the said obstruction, broke down so much of the said fence as consisted of the high gate, and by reason thereof the two colts of the plaintiff strayed &c. upon the railway and were killed by a locomotive engine of the defendants, &c.

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Pleas.—First: Not guilty. Second, fourth, sixth, ninth: traverses of the several ways alleged. Third, fifth, seventh and twelfth: that the damage in several counts mentioned was not occasioned by the breaches of duty by the defendants in those counts mentioned. Tenth, to last count: that the colts were not lawfully on the plaintiff's land adjoining the railway; but upon the lands of some other person. Eleventh, to last count: that it was not by reason of the breaking down of the gate in that count mentioned that the colts escaped and were killed (a).

Issues were joined upon these pleas.

At the trial before *Cresswell*, J., at the Spring Assizes for the county of Surrey, it appeared that the plaintiff was possessed of two fields, connected by an occupation way, along which there was a public footway leading to a high road. The occupation way was crossed by the railway on a level. At the points at which the occupation way abutted on the railway, the defendants had put up gates which were very high and inconvenient for foot passengers to get over, but they had not made any bridge over the railway or put up a stile. Locks had been put upon the gates by the defendants, who had given a key to one of the plaintiff's servants. For some time the plaintiff was in the habit of keeping the gates locked, but afterwards the key was lost. The gate through which the colts escaped had been broken by persons getting over it, and had been afterwards repaired. In November, 1855, one Woods, a servant of the plaintiff, put the colts into the plaintiff's meadow. He alleged that he fastened the gate by cutting a stick from the hedge and putting it into the staple. Shortly afterwards the gate was found open, and the colts, which had strayed upon the

(a) The defendant also demurred to the first, second and last counts. The demurrer was set down for argument, but after

the refusal of the rule in this case, was withdrawn by arrangement between the parties.

railway, were found dead, having been run over by a locomotive engine belonging to the defendants. It did not appear how the gate had been opened. It was contended by the plaintiff's counsel, that by 8. & 9 Vict. c. 20, s. 46, the consent of two justices in petty sessions not having been obtained, the defendants were not justified in making a railway over the public footway on a level, and that they were liable for all the consequences resulting from their having so constructed their line. The learned Judge asked the jury whether the accident arose from the negligence of the defendants, and whether it was in any way attributable to the negligence of the plaintiff or his servants. The jury found for the defendants on all the issues, except the traverse of the way being a public footway.

Montagu Chambers, in Easter Term, obtained a rule for a new trial, on the ground of misdirection, against which

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Edwin James, Lush and C. G. Addison shewed cause.— If the plaintiff, by his own negligence in omitting to have the gate secured, contributed to the injury which he has sustained, he cannot make the defendants liable for the consequences: *Caswell v. Worth* (a). The immediate cause of the accident was the omission by the person who had last passed over the occupation way to fasten the gate. There is a difference between an occupation way and a highway, as regards the duty of the owners of a railway crossing it. In the case of a highway, it was held in *Fawcett v. The York and North Midland Railway Company* (b) that it is the duty of a railway company to keep the gates adjoining the railway closed against everything, whether straying or passing. But in the case of an occupation way it is the duty of the owner of the way to keep the gates locked, and thus prevent cattle from straying from it

(a) 5 E. & B. 849.

(b) 16 Q. B. 610.

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on to the railway. By the 8 & 9 Vict. c. 20, s. 75, persons omitting to fasten such gates are made liable to a penalty. The only wrongful act was the obstruction of the footway, but the accident did not result from that.

M. Chambers, in support of the rule.—The case of *Fawcett v. The York and North Midland Railway Company* (a) is a conclusive authority that where highways cross a railway the company are bound to comply strictly with the precautions directed by their Act to be observed, and that if they do not, they must take all the consequences. By the 8 & 9 Vict. c. 20, s. 46, if the line of railway crosses any public highway the railway is to be carried over the highway, or the highway over the railway, by a bridge, but it is provided that by consent of two justices the Company may carry the railway across the highway on a level. By s. 61, if the railway cross any footway on the level, the Company are to make good and sufficient gates or stiles on each side of the railway where the highway shall communicate therewith. The learned Judge ruled that it was the duty of the plaintiff to keep the gate locked. That, however, would have been an obstruction of the footway, and therefore unlawful. By s. 68, the Company were bound to make and maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, sufficient “fences for separating the land taken for the use of the railway from the adjoining lands not taken, and for protecting such lands from trespass, or cattle &c. from straying thereout by reason of the railway, together with all necessary gates, made to open towards such adjoining lands and not towards the railway, and all necessary stiles.” Here the gate was not sufficient to prevent cattle straying, because the plaintiff could not

(a) 16 Q. B. 610.

lawfully fasten it; there should have been a stile. If there had been a bridge or a proper stile, the persons using the footway would not have broken down the gates. [*Pollock*, C. B.—Suppose a person is bound to repair a way and omits to do so, by reason of which foot passengers trespass on land adjoining the way, can the person neglecting to repair be made liable for such trespass?]

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POLLOCK, C. B.—This was an application for a new trial on the ground of misdirection. The learned Judge ruled, that in cases like the present it is one element of the inquiry whether the plaintiff has contributed to the injury sustained by him, by his own negligence or that of his servants, and that if the plaintiff has been guilty of such negligence he is not entitled to recover. That was a correct statement of the law, and therefore this rule must be discharged. It was not necessary to state to the jury whether the Company were wrongdoers in not having made a bridge so that foot passengers could cross the railway without opening the gate, because, even if that is so, if the plaintiff's negligence contributed to the accident he is not entitled to recover. I cannot adopt the suggestion of the plaintiff's counsel, that because foot passengers had a right to go along the footpath, they had therefore a right to prostrate the gate. It is not like the case of the obstruction of a way by a private individual. The railway was made under the powers of an act of parliament. The makers of the railway might have been compelled to complete it. In obstructing the way by their railway they were not wholly wrongdoers, for what they did would have been well done if they had done something more. If, in a case like the present, foot passengers feel themselves aggrieved by the obstruction of a path by the fences or gates of a railway, they may apply to the Court of Queen's Bench for a mandamus, or seek some other remedy

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in a Court of law, but they must not destroy the gates or fences of the railway so as to permit cattle to escape on to the line, and thereby endanger the lives of persons travelling on it. The argument of the plaintiff's counsel on this point, if correct, might justify the abatement of the earth-work of railway itself if it obstructed the way.

MARTIN, B.—I am of the same opinion. There was an occupation road from a turnpike road to a field of the plaintiff, and on the occupation road was a public footway. The cattle of the plaintiff, which were put into his field, strayed into the occupation road, and from thence on to the railway, where they were killed. It is said that the railway company had not done their duty; that they ought to have made a bridge over the railway for foot passengers. But assuming that to be so, the rights of the plaintiff and the defendants must be regulated with respect to their duties to each other. In all the counts of the declaration the question whether the accident happened by reason of the plaintiff's negligence is involved. Gates were placed by the defendants, with locks upon them, to prevent cattle from straying and a key was given to the plaintiff, which was afterwards lost. The plaintiff therefore took upon himself the obligation of looking after the gates, and before any obligation could arise on the part of the defendants to secure the gates in any other manner, notice of the loss of the key should have been given to them. The learned Judge properly left it to the jury to say whether the colts strayed on to the railway by reason of the plaintiff's default.

BRAMWELL, B.—I also think that the rule must be discharged. It is contended that this is a case where the plaintiff has a right of action against the defendants, notwithstanding any default on his own part. There may be

such cases, where the neglect of duty on the part of a defendant is one against which the plaintiff is not bound to be on his guard; but here no case is made. As to the first count, it was not shewn that the accident happened in consequence of the footway not being carried over the railway by a bridge. The second and third counts also failed in proof. The breach of duty alleged in the fourth count is not an offence against any private right, and does not give any right of action to the plaintiff if he wantonly or negligently allowed his colts to escape.

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WATSON, B.—I am entirely of the same opinion. It seems clear that no one had suggested to the defendants that there was a footpath over the occupation way. The plaintiff had treated the way as an occupation way, and had got a key of the gates across it, and kept them locked. It must therefore be taken that the plaintiff agreed that a gate with a lock on it was the proper mode of protecting his cattle. If, by his own voluntary act, the plaintiff contributed to the accident, he cannot recover: *Holden v. The Liverpool New Gas and Coke Company* (a).

Rule discharged (b).

(a) 3 C. B. 1.

(b) See *The Manchester, Sheffield and Lincolnshire Railway Company*, Appellants, *Wallis*, Re-spondent, 14 C. B. 213; *The Midland Railway Company v. Daykin*, 17 C. B. 126.

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June 9.

ROBERTS v. AULTON.

In the year 1810, a chapel was purchased for the purpose of being consecrated as a chapel of ease in the parish of A. The chapel was consecrated under the provisions of a deed, dated the 25th August, 1810, by which the parish clerk and sexton were to be entitled to the fees for christenings, burials and marriages in the chapel and cemetery thereof, as if they had taken place in the mother church. By an order of her Majesty in council, of the 2nd August, 1853, the chapel was created a district chapelry under the 16th section of the 59 Geo. 3, c. 134. By the 10th section of that Act, when any parish shall be divided under the provisions of the 58 Geo. 3, c. 45, or this Act, all fees belonging to the parish clerk or sexton respectively of any such parish, which shall thereafter arise "in any district or division of any parish divided" under the provisions of the 58 Geo. 3, c. 45, shall belong to and be recoverable by the clerks and sextons of each of the divisions of the parish to which they shall be assigned. The plaintiff, who was clerk and sexton of the parish of A., having brought an action for money had and received, against the defendant, the clerk and sexton of the chapel, for the fees received by him for christenings, burials, and marriages in the chapel.—*Held*: First, that the action for money had and received would lie for these fees.

Secondly: That this being a "district chapelry," was not within the operation of the 10th section of the 59 Geo. 3, c. 134, and therefore that the plaintiff, as clerk and sexton of the parish was entitled to the fees arising at the chapel.

IN the above cause a special case was stated for the opinion of this Court (so far as material) as follows:—

This was an action to recover 43*l*. 15*s*. as money received by the defendant to the plaintiff's use, from the 19th of August, 1853, until the commencement of the suit.

The plaintiff during the above period was clerk and sexton to the parish church of Aston juxta Birmingham, in the county of Warwick, and the defendant during the same time was clerk and sexton to the district chapel of St. James Ashted, in the same parish; and the above sum was the amount of fees received by the latter in that capacity, from time to time during that period, upon the publication of banns and marriages and churchings in the said chapel, and upon burials performed in the burial ground belonging to the same.

In the year 1810, the said chapel then called Ashted Chapel, situate at Ashted in the hamlet of Duddeston and parish of Aston juxta Birmingham, and 5,430 square yards of land adjoining thereto, were purchased by subscription, for the purpose of having the said chapel consecrated as a chapel of ease to the parish church of Aston aforesaid, and the said land belonging thereto consecrated

as burial ground for the interment of persons dying within the said hamlet.

By indenture, dated the 25th of August, 1810, made between George Simcox and John Botton of the first part; the Lord Bishop of Lichfield and Coventry of the second part; Heneage Legge of the third part; the Reverend Benjamin Spence of the fourth part, and Richard Spooner, Thomas Jones and Thomas Beilby of the fifth part; the said chapel and land were by virtue of the 43 Geo. 3, c. 108, conveyed to the said Richard Spooner, Thomas Jones and Thomas Beilby and their heirs; upon trust to get the said chapel consecrated as a chapel of ease to the parish church of Aston, near Birmingham, aforesaid, and the said land consecrated as a cemetery or place of burial for the bodies of persons dying in the said hamlet of Duddeston, and of the parish of Aston aforesaid; and the right of nominating the minister (being approved of by the bishop, patron, and incumbent for the time being of the said parish of Aston, and licensed by the Lord Bishop of Lichfield,) was thereby vested in the said George Simcox for sixty-five years, and afterwards in the vicar of the parish church of Aston. And the said chapel when consecrated was to be endowed by the pew rents.

And by the said indenture it was declared that the curate and clerk should have the like fees, for christenings in the said chapel, and for burials in the vaults and in the chapel-yard, and for grave stones, as then were or should be taken by the vicar and parish clerk of the parish of Aston, and exclusive of the same; and that the fees due to the vicar and clerk of Aston for baptisms and burials in the chapel and chapel-yard should from time to time be received by the curate and clerk of the said chapel, and paid by them on the first day of every quarter to the vicar and clerk of the mother church of Aston, and that a clerk

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should be appointed by the officiating minister for the time being, and that the sexton of Aston should be sexton of the said chapel-yard.

On the 7th of September, 1810, the said chapel and burial ground were duly consecrated by the name of St. James, by the Bishop of Lichfield and Coventry. The consecration deed of that date, after reciting to the effect above mentioned, and that the patron, the vicar of the parish church of Aston, the churchwarden of the parish, and certain inhabitants of the hamlet of Duddeston had in their own names and in the names of the rest of the inhabitants of the hamlet, duly petitioned the Bishop of Lichfield and Coventry to consecrate and set apart the said chapel and chapel-yard on the terms and conditions and reservations therein; he, the said bishop, did set apart and consecrate the said chapel by the name of St. James as a chapel of ease to the mother church of Aston. And the minister was authorized to administer baptism therein, to church women and to solemnize matrimony therein in case it should thereafter be declared by act of parliament lawful so to do in chapels of new foundation, but not otherwise; and to perform all things usual and lawful in other churches and chapels. And the said chapel-yard was declared to be for the use of the inhabitants of the hamlet of Duddeston and parish of Aston, in addition to the ancient church-yard of the parish of Aston. And it was thereby declared that the curate or minister of the said chapel should baptize the children of the said hamlet in the said chapel and bury the dead in the vaults and chapel-yard there, and assist in visiting the sick in the said hamlet, reserving nevertheless to the vicar, churchwardens, parish clerk, sextons, and all other officers of the said parish church of Aston for the time being, all right, title and interest in and to all tithes, oblations, obventions, offerings, fees, rights, profits, privileges,

ecclesiastical dues, duties and rates whatsoever, ordinary and extraordinary, to them respectively and severally due or of right accustomed, as though the consecration had not taken place. And it was thereby also decreed and declared that the curate and clerk of the said chapel should from time to time receive the usual fees due to the vicar and parish clerk for all christenings in the said chapel, and for all burials in the said vaults and chapel-yard, the same as if they had been baptized in the parish church of Aston, or buried in the vaults or in the church-yard of the said parish, over and above all the like fees for themselves; and should on the first day of every quarter in the year pay the same to the vicar and parish clerk of Aston for ever thereafter. And it was further decreed that a clerk should be appointed by the said curate and should be paid a salary out of the said chapel rate. And that the sexton of the church of Aston should be the sexton of the said chapel and chapel-yard, for the time being, and entitled to the same fees only as were paid at Aston.

From the time of the consecration of the said chapel to the year 1841 (when he died) R. Roberts was the clerk and sexton of the parish of Aston. On his death the plaintiff was appointed clerk of the parish of Aston; and afterwards was duly licenced as clerk by the bishop. And in the year 1844, he was duly appointed sexton of the parish of Aston. And from the respective times last mentioned, up to the 19th of August, 1853, the clerk of St. James received the fees paid upon all burials performed in the said chapel-yard, and paid them over to the plaintiff in addition to fees received and retained by himself.

On the 8th of August, 1853, the following order was made by her Majesty in council:—

Whereas her Majesty's commissioners for building new churches have, in pursuance of the 16th section of an Act

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of Parliament, passed in the 59th year of the reign of his Majesty King George the 3rd, intituled, &c. (59 Geo. 3, c. 134), and of the 3rd section of an Act passed in the session of parliament, held in 2nd and 3rd years of her Majesty's reign, intituled, &c. (2 & 3 Vict. c. 49), duly prepared and laid before her Majesty in council a representation, bearing date the 19th day of July, 1853, in the words following, viz. :—

Your Majesty's Commission for building new churches beg leave humbly to represent that having taken into consideration all the circumstances of the parish of Aston juxta Birmingham in the county of Warwick and in the diocese of Worcester, it appears to them to be expedient that a particular district should be assigned to the consecrated church of St. James, situate at Ashted in the parish of Aston juxta Birmingham, under and by virtue of the power or authority contained in the 16th section of an Act of Parliament, passed, &c. (59 Geo. 3, c. 134), and in the 3rd section of an Act of Parliament, passed, &c. (2 & 3 Vict. c. 49), and that such proposed district should be named or called, "The District Chapelry of Ashted."—(The boundaries of the said proposed district were then set out). Your Majesty's said commissioners beg leave further to represent, that it also appears to them to be expedient that banns of matrimony should be published, and that marriages, baptisms, churchings, and burials should be solemnized or performed in the said church of St. James at Ashted, and that the fees to arise therefrom should be paid and belong to the minister or incumbent thereof for the time being. That the consent of the bishop of the diocese of Worcester has been obtained thereto as required by the Acts and sections hereinbefore mentioned, &c.—Her Majesty, having taken the said representation, together with the map and plan thereunto annexed, into considera-

tion, was pleased, by and with the advice of her privy council to approve thereof and to order: And it is hereby ordered, that the proposed assignment of a district chapelry to the said consecrated church of St. James at Ashted be accordingly made, and that the recommendation of the said commissioners in respect of the publication of banns, and the solemnization of marriages, churchings, and burials, in the said church, and the fees to arise therefrom be carried into effect agreeably to the provisions of the said Acts.

C. C. GREVILLE.

The defendant was on the 12th April, 1844, appointed clerk of the chapel of St. James by the then curate and minister of the same, and in like manner was appointed sexton thereof, by the same person, on the 17th August, 1853.

From the publication of the above order the defendant has refused to allow the plaintiff to act as clerk or sexton of the said chapel, or in any manner to interfere with the chapel-yard thereof; and he has himself acted as the clerk and sexton of the said chapel and chapel-yard, and has received in that capacity all the fees upon banns, marriages and churchings performed in the said chapel, and upon all burials performed in the chapel-yard, amounting in the whole to 43*l.* 15*s.*, that is to say, for banns 1*l.* 6*s.*, for marriages 3*l.* 10*s.*, for christenings 1*l.* 19*s.*, for burials 37*l.*, and has refused to pay over any part of such amount to the plaintiff.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover the said fees, or any and what portion thereof. If the Court shall be of opinion that he is so entitled, judgment is to be entered by confession for the plaintiff for such sum or sums as the Court shall direct. If the Court shall be of a contrary opinion, judgment is to be entered for the defendant.

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Phipeon (*Cripps* with him) argued for the plaintiff (June 3).—The question is, what is the operation of the 59 Geo. 3, c. 134, s. 10. The consecration deed of the 7th September, 1810, reserved to the parish clerk and sexton of the parish church of Aston all fees actually due or of right accustomed, as though the consecration had not taken place; and it provided that the clerk of the chapel should receive the usual fees for christenings and burials as if they had taken place in the parish church over and above the like fees for themselves, and should pay over the same to the parish clerk of Aston. Therefore, up to the time of the publication of the Order in Council, the plaintiff was clearly entitled to the fees. *Spry v. Emperor* (a) proceeded on the ground that the fees were due by custom. Here there was a contract between the parties that the incumbent and parish clerk should receive the fees for all the christenings and burials within the parish. [*Watson*, B., referred to *Spry v. Gallop* (b).] In that case the fee claimed by the rector had never been received, and there was no evidence that it was due by custom; here the contract is equivalent to a custom. Then, is the plaintiff's right affected by the Church Building Acts? Under those Acts three courses may be taken in populous parishes. By the 58 Geo. 3, c. 45, s. 16, if it shall appear to the commissioners expedient, any parish may be divided into two or more distinct and separate parishes for all ecclesiastical purposes. By section 21, if the commissioners shall be of opinion that it is not expedient to divide any parish into such complete, separate and distinct parishes, but that it is expedient to divide the same into ecclesiastical districts, that division may be made. By section 22, the boundaries of the new parishes created by such complete division, and also the several districts of any parish, are to be enrolled in

(a) 6 M. & W. 639.

(b) 16 M. & W. 716.

Chancery; and thereupon such districts become separate and distinct district parishes for all ecclesiastical purposes. By the 59 Geo. 3, c. 134, s. 16, the commissioners may assign a particular district to any chapel, such district to be under the immediate care of the curate, but subject to the superintendence and controul of the incumbent of the parish church, and it enables the commissioners, with the consent of the bishop of the diocese, to determine whether any and what part or proportion of the fees due for marriages, baptisms, churchings and burials, shall be assigned to the curate: it makes no provision for the fees of the clerk or sexton. Under that enactment the district assigned to this chapel became, by the order in council, a distinct chapelry. The 2 & 3 Vict. c. 49, and 14 & 15 Vict. c. 97, contain provisions with respect to such a chapelry. This case is not within the 10th section of the 59 Geo. 3, c. 134, which enacts, that when any *parish shall be divided* under the provisions of the 58 Geo. 3, t. 43, or this Act, all fees belonging to the parish clerk or sexton of any such parish, which shall thereafter arise in any district or division of any parish, shall be recoverable by the clerks and sextons of each of the divisions of the parish to which they shall be assigned, and the commissioners are to make compensation for loss of fees which any clerk or sexton may sustain by reason of any such division. Moreover, the 6th section of the 14 & 15 Vict. c. 97, provides, that where the fees are not reserved, or do not otherwise belong to the incumbent of the original parish, all the fees arising within such district chapelry shall be paid to the incumbent for the time being of such district chapelry, notwithstanding no compensation for the loss thereof has been made to the incumbent of the original parish.

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The Solicitor General (Lush with him) for the defendant.—

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First, an action for money had and received will not lie for these fees. By the consecration deed, the clerk of the chapel is to receive his own fees, and in addition the fees of the clerk of the parish, and pay the latter over to him. It does not appear from the case that the defendant has received more than is due to himself. It is true that these statutes contemplate three modes of division in populous parishes, viz., a distinct parish, an ecclesiastical district, and a district chapelry, and that the 16th section of the 59 Geo. 3, c. 134, makes no provision for the fees of the clerk or sexton of a district chapel, but this case is provided for by the 10th section of that Act. Though that section in its commencement uses the words "when any parish shall be *divided*," it goes on to say "fees due to the parish clerk or sexton of any parish which shall thereafter arise in any *district* or division of any parish divided. These words are sufficient to comprehend this case. [*Martin*, B., referred to *Edgell v. Burnaby* (a). * *Bramwell*, B.—The 30th section of the 59 Geo. 3, c. 134, uses the words "in every district, parish, or division of any parish or district chapelry or consolidated chapelry, in which any church or chapel shall be built, acquired, or appropriated."]

Phipson, in reply.—The 30th section of the 59 Geo. 3, c. 134, shews that a district chapelry is different from a division of a parish. The word "district" in the 10th section has reference to an ecclesiastical district, and the word "division" to a parish divided: the assignment of a district to a chapel is not within the terms of that section. The 8th and 9th sections shew what is meant by the words "division of any parish" in the 10th section. A parish is in no sense divided when, within the parish, a new chapelry is added to it.

Cur. adv. vult.

(a) 8 Exch. 788.

The judgment of the Court was now delivered by

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POLLOCK, C. B.—This was an action for money had and received; and it was to try the right of the parish clerk and sexton of the parish of Aston juxta Birmingham to recover the fees received by the defendant for burials, christenings and marriages at the district chapel of St. James Ashted within that parish. This chapel was purchased in 1810 for the purpose of being consecrated as a chapel of ease in that parish. The chapel was consecrated and established under the provisions of a deed set out in the case, dated the 25th August, 1810, by which the parish clerk and sexton were to be entitled to the fees for christening, burials, and marriages in the chapel and cemetery thereof, as if they had taken place in the mother church. By an order in council of the 8th August, 1853, it was created a district chapel under the 16th section of the 59 Geo. 3, c. 134.

It was discussed during the argument, whether or not the money received by the defendant was money had and received to the use of the plaintiff. We all think it was so recoverable, for he received these sums of money as and for the legal fees for burials, &c., and if they belonged to the plaintiff they are recoverable in this form of action. This case is distinguishable from the case of *King v. Alston* (a), inasmuch as the defendant in that case only received the portion of the fees he himself was entitled to. The question then is, whether or not the fees belong to the plaintiff. Unless taken away by an act of parliament, it was conceded that they belonged to the plaintiff. The right depends on the 10th section of the 59 Geo. 3, c. 134, which enacts,—“That when any parish shall be divided under the provisions of the said recited Act or of this Act, all fees, dues,

(a) 12 Q. B. 971.

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profits, and emoluments belonging to the parish clerk or sexton respectively of any such parish, whether by prescription, usage or otherwise, which shall hereafter arise in any district or division of any parish divided under the provisions of the said recited Act, shall belong to and be recoverable by the clerks and sextons respectively of each of the divisions respectively of the parish to which they shall be assigned, in like manner in every respect and after the same rate as they were before recoverable by the clerk and sexton respectively of the original parish; and it shall be lawful for the said commissioners in every such case to ascertain and make compensation, in manner directed by the said recited Act, in cases of compensation by reason of loss of fees, for any loss of fees, dues, profits, or emoluments which any clerk or sexton may sustain by reason of any such division." In order to understand the meaning of the words "divided parish" and of "any district or division of any parish divided," it is necessary to refer to the provisions of the statute 58 Geo. 3, c. 45. The 16th section of that Act provides for the division of parishes into two separate parishes; and sections 21, 22, 23 and 24 provide for the erection of churches with a district attached to them, which are to be separate parishes for ecclesiastical purposes, with certain rights retained to the incumbent of the mother church; and these latter districts are the districts or divisions of divided parishes, referred to in section 10 of the Act 59 Geo. 3, s. 134, above set forth. The present chapel and cemetery is a district chapel of ease, erected under the 16th section of the 59 Geo. 3. In the subsequent Church Building Acts, 2 & 3 Vict. c. 49, and 14 & 15 Vict. c. 97, they are designated as district chapels and the districts are termed district chapelries. It is clear, therefore, that these district chapels are not within the operation of the 10th

section of the 59 Geo. 3, and we do not find a provision in any subsequent Act for taking these fees arising at the chapels from the parish clerk and sexton in parishes where there is a district chapel.

We are therefore of opinion that these fees still belong to the present clerk, and consequently he is entitled to our judgment for the whole of the fees mentioned in the case.

Judgment for the plaintiff.

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WILLIAMS v. SMITH.

*Judgt. aff'd in Ex. Ch.
11th Nov 59
June 5 & 6.*

THIS was an interpleader issue to try whether thirteen steers, seized by the sheriff of Gloucestershire in December last under an execution against the goods of one Selwyn at the suit of the present defendant, were the property of the present plaintiff as against the execution creditor, the present defendant.

At the trial, before *Willes, J.*, at the last Spring Assizes at Gloucester, it appeared that the writ of *fi. fa.* was delivered to the sheriff in April 1856. On the 29th of July the 19 & 20 Vict. c. 97. passed. In August the plaintiff bought the steers in question, from Selwyn and paid for them, and in December they were seized by the sheriff under the writ of *fi. fa.*

It was objected on behalf of the defendant, that the 1st section of "The Mercantile Law Amendment Act, 1856," (19 & 20 Vict. c. 97) (a), was not retrospective, and therefore

The Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 1, which enacts, that "no writ of execution against the goods of a debtor shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure or attachment, provided he had no notice" does not apply in case where the writ of execution was delivered to the sheriff before the passing of the Act.

(a) Sect. 1. "No writ of *fieri facias* or other writ of execution, and no writ of attachment against the goods of a debtor, shall pre-

judice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure or at-

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that the goods were bound by the delivery of the writ to the sheriff, notwithstanding that Act. The jury found that the sale to the plaintiff was *bonâ fide* and for a valuable consideration, whereupon the learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him if the Court should be of opinion that the statute applied.

The Solicitor General, in last Easter Term, obtained a rule nisi accordingly (a), against which

Pigott, Serjt., and *H. James* now shewed cause.—It is admitted that, except for the 1st section of “The Mercantile Law Amendment Act, 1856,” the property of the steers would, to a certain extent, have been bound by the writ, from the time of its delivery to the sheriff; and the execution creditor would have had some interest in the cattle, though by no means a vested interest, because such interest might have been defeated by a sale in market overt, by their removal out of the sheriff’s jurisdiction, or by the bankruptcy of the debtor. [*Martin*, B.—It is said, in 1 Wms. Saund. 219, g. 6th ed.—“The meaning of the expression (in 29 Car. 2, c. 3, s. 16,) that the property of the goods is *bound*, is not that the property in them is *altered*, for such alteration does not, nor ever did, take place until actual sale of the goods under the writ; but that the defendant, from the time that they are bound, cannot dispose of them unless in market overt, so as to

tachment thereof by virtue of such writ; provided that such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the

hands of the sheriff, undersheriff, or coroner.”

(a) The rule was also obtained on the ground that the plaintiff at the time of the purchase had notice of the writ under the Act, but the decision of the Court on the first point rendered the other immaterial.

prevent their being taken in execution."] It is also so stated in *Harding v. Hall* (a). But the 19 & 20 Vict. c. 97, s. 1, has a retrospective effect and prevents the *fi. fa.* prejudicing the title of the plaintiff. The object of that enactment was to amend the laws affecting trade and commerce, to get rid of inconveniences felt by persons engaged in trade, by reason of the laws in England being in some particulars different from those in Scotland, and to quiet the title of owners of goods. The 1st section indirectly affects the rights of persons issuing execution, but it directly gives protection to innocent purchasers. The other side must contend, that although the 1st section says that *no writ* of execution against the goods of a debtor shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration, before the actual seizure thereof by virtue of such writ, yet, it means only *no writ hereafter issued*. The Act however is general in its terms, and affects all writs whether issued before or after it passed. The language is plain, and there is no reason for giving it a limited meaning. If the Act does not apply to writs lodged with the sheriff at the time of its passing, it will be necessary to inquire for a series of years in the sheriff's office, as to the existence of writs, in order fully to protect a purchaser. It is said in *Dwarris on Statutes* (b), "there are authorities for extending remedial enactments to inchoate transactions, where the words used enabled the Court to give the law a retroactive effect." *Freeman v. Moyes* (c) and *Towler v. Chatterton* (d) are authorities to the same effect. Formerly, when the passing of a statute referred to the first day of the session, the argument against the statute being retroactive as to inchoate transactions was cogent; but that argument no longer applies. It has already been decided

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(a) 10 M. & W. 42, 47.

(c) 1 A. & E. 338.

(b) 2nd Edition, 541.

(d) 6 Bing. 258.

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by *Kindersley*, V. C., in *Thompson v. Waithman* (a), that section 14 of this Act has a retrospective effect.

The Solicitor General (with whom was *Macnamara*), in support of the rule.—It is a general principle, that a new statute ought not to be construed so as to give it a retrospective operation, unless it clearly appears that such was the intention of the legislature. [*Martin*, B.—That principle was fully considered and adopted by this Court in *Moon v. Durden* (b).—*Watson*, B., referred to *Gilmore v. Shuter* (c).]

Per CURIAM. (d)—We are of opinion that this rule must be absolute (e).

Rule absolute (f).

(a) 3 Drewry, 628.

(b) 2 Exch. 22.

(c) T. Jones, 108; 2 Show. 17.

(d) *Pollock*, C. B., *Martin*, B.,
Bramwell, B., and *Watson*, B.

(e) See *Moore v. Philipps*, 7
 M. & W. 536.

(f) Reported by Douglas
 Brown, Esq.

May 28.

CHURCHWARD and BLIGHT v. FORD.

Copyhold lands were devised to the plaintiffs in trust for F. for life, but the plaintiffs were never admitted to the copyhold.

DEBT for use and occupation.—Pleas: Never indebted. Payment.—Whereupon issue was joined.

At the trial before *Cockburn*, C. J., at the Spring Assizes for the county of Devon, it appeared that in 1851 William Foss died, having by his will devised certain copy-

At the time of the death of the testator the lands were in the possession of the defendant, to whom F., with the assent of one of the plaintiffs, afterwards re-let them in her own name. The plaintiffs then gave notice to the defendant to pay the rent to them.—*Held*, that an action for use and occupation would not lie by the plaintiffs against the defendant, because no contract could be implied between them, there having been an existing contract between the defendant and F., and the occupation having been by permission of F.

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hold premises to the plaintiffs, in trust to pay the rents to his widow, Mrs. Foss, for her life, and he appointed the plaintiffs and Mrs. Foss executors and executrix. The plaintiffs had never been admitted tenants of the manor. The defendant had been in possession of the premises since Christmas, 1850, having originally taken them for three years from William Foss. In June, 1853, he received a notice to quit, signed by the plaintiff Churchward, and Mrs. Foss, as executor and executrix. At Christmas, 1853, a new agreement in Churchward's handwriting, purporting to be a letting by Mrs. Foss, was sent to the defendant. This agreement was never executed, but the defendant continued to hold the premises, and always paid the rent to Mrs. Foss. In June, 1855, Churchward, as trustee under the will of William Foss, gave notice to the defendant not to pay rent to any other person than himself. Upon this the defendant saw the other plaintiff, Blight, who told him to pay the rent to Mrs. Foss.

The learned Judge asked the jury whether, in December, 1853, the defendant took the premises from Churchward, or from Mrs. Foss; he said, that if Mrs. Foss received the rents, but Churchward let the premises, then the defendant was tenant to the plaintiffs. The jury found that the letting was by Mrs. Foss, with the assent of the plaintiffs, upon which the learned Judge directed a verdict for the defendant, reserving leave to the plaintiffs to move to enter a verdict for them, if upon the facts the Court should be of opinion that the plaintiffs had made out their case.

A rule nisi having been obtained for that purpose,

Montague Smith and *Karslake* now shewed cause.—First, the jury having found that the defendant took the premises from Mrs. Foss, there is no estoppel as between the defendant and the plaintiffs. The plaintiffs were, therefore,

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bound to prove their title. But the devisee of a copyhold has no interest before admittance: *Doe d. Tofield v. Tofield* (a); *Matthew v. Osborne* (b). Secondly, the plaintiffs cannot maintain this action, it being found expressly that Mrs. Foss let to the defendant. *Hellier v. Silcox* (c) may be relied on by the other side; but if the plaintiffs are entitled to recover, a tenant who has rented land for many years of one person might be called upon to pay rent over again to another.

Collier and Carter, in support of the rule.—The plaintiffs, as trustees having the legal estate, had a right to take the property into their own hands; and they gave notice to the defendant that they had done so. [*Pollock*, C. B.—The plaintiffs should have brought ejectment; they cannot convert a notice into a contract.] The surrenderee of a copyhold may bring ejectment before admittance; but in fact the plaintiffs were in possession. They dealt with the property and gave the defendant notice of their title. Mrs. Foss had no title at all. The plaintiffs were not therefore in the position of mere strangers. In *Standen v. Christmas* (d), the Court held the defendant entitled to recover for use and occupation, without proof of any contract between him and the defendants.

POLLOCK, C. B.—I am of opinion that this rule must be discharged. The only matter we have to decide is whether, upon the leave reserved by the Lord Chief Justice, the plaintiffs are entitled to have a verdict entered for them. It was left to the jury to say whether the contract was with the plaintiffs or with Mrs. Foss, and the jury found that the contract was made with Mrs. Foss. There are authorities to

(a) 11 East, 246.

(b) 13 C. B. 919.

(c) 19 L. J. N. S., Q. B. 295.

(d) 10 Q. B. 135.

the effect that where nothing appears except that one person is entitled to land which another has occupied and enjoyed, an action for use and occupation may be maintained, because a contract may be implied. That explains the decision in the case of *Hellier v. Sillcox* (a). But the taking possession as of right by a disseisor could not be turned into a contract, on the notion that the trespass may be waived and some imaginary contract substituted. Here the defendant was in possession claiming title under Mrs. Foss with whom he in fact contracted. It cannot therefore be implied that there was a contract with the plaintiffs.

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BRAMWELL, B.—I am of the same opinion. The plaintiffs seek to recover money payable for the defendant's occupation of certain land, by the permission of the plaintiffs. The plaintiffs have therefore to make out that the occupation was by their permission. I think that they have also to make out a contract. The action for use and occupation existed before the 11 Geo. 2, c. 19, but until the passing of that act the plaintiff was nonsuited if a demise was proved. Except in that particular, the statute did not make the action maintainable in cases where it could not have been maintained before. Without dissenting from the suggestion of the Lord Chief Baron, that in the case put by him, a person may be liable without proof of actual contract, because in fact a contract may in such cases be inferred, I think that, nevertheless, the action depends upon contract. Here it is found that the plaintiffs occupied by the permission of Mrs. Foss and by virtue of a contract with her. The fact that Churchward assented

(a) 19 L. J., N. S., Q. B. 295. *Company*, 5 Exch. 932, 937;
 See also, per Parke, B., *Turner v. Mayor of Newport v. Saunders*,
Cameron's Coalbrook Steam Coal 3 B. & Ad. 411.

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to the letting by Mrs. Foss to the defendant, is an additional point against the plaintiffs. In *Helier v. Silcox* (a), the Court found that the occupation was with the plaintiff's permission. In *Standen v. Christmas* (b), Lord Denman appears to have been mistaken in supposing that the statute gave a right of action to the owner of the land. The word "landlord" does not mean the lord of the soil, but the person between whom and the tenant the relation of landlord and tenant exists. That sense is given to the word in Johnson's Dictionary and Webster's Dictionary. The Court, however, thought that the occupation was in point of law by the permission of the plaintiff. Therefore, whether that case was rightly or wrongly decided, it is not inconsistent with the doctrine, that it is incumbent on the plaintiffs in this action to shew that the occupation has been by their permission, and under a contract express or implied.

WATSON, B.—I also agree that the rule must be discharged. The plaintiffs, as devisees of a copyhold, before admittance had no title, and there was no contract between them and the defendant by which he was estopped. The plaintiffs allowed Mrs. Foss to have possession of the property, and she let to the defendant, with the assent of Churchward, in her own name. That shews that in letting the premises she did not do so as the agent of the plaintiffs, but as being the person interested in the property, and as having the general management and control of it in her own hands.

Rule discharged (c).

(a) 19 L. J., Q. B. 295.

(b) 10 Q. B. 135.

(c) See *Cripps v. Blank*, 9 D. & R. 650.

1857.

In the matter of a plaint in the County Court of Staffordshire, between CHARLES HUNT, Plaintiff, and THE NORTH STAFFORDSHIRE RAILWAY COMPANY, Defendants.

June 11.

HUDDLESTON had obtained a rule calling on the defendants to shew cause why an order of *Coleridge, J.*, for a prohibition, should not be set aside.

It appeared from the affidavits, that The North Staffordshire Railway Company were summoned to appear at the County Court of Staffordshire, holden at Stoke upon Trent, on the 12th of March, 1857, to answer the plaintiff on a claim, the particulars of which were as follows:

" Debt or claim	£17 12 6
Costs of plaint	15 0
Total	£18 7 6

The action is brought for the recovery of the sum of 17*l.* 12*s.* 6*d.*, being for monies paid, and for loss of time and attendance before the magistrates at Longton, on the 28th day of January last, upon a complaint and information of William Woolgar, station master, on the part and behalf of the above defendants, against the said plaintiff, when the same was heard and dismissed."

The items were given at length. The complaint before the magistrates was, that the plaintiff had ridden in a railway carriage, on the railway of the defendant, without having paid his fare. Upon the hearing, the magistrate dismissed the summons with costs amounting to 8*l.* 19*s.*, on the ground that the plaintiff was not the person who malicious prosecution, and that therefore the order for the prohibition was

The plaintiff sought to recover in a County Court "17*l.* 12*s.* 6*d.*, being for monies paid, for loss of time and attendance before the magistrates, upon a complaint and information of W. on behalf of the defendants." It appeared that the plaintiff having been summoned before the magistrates for riding in a railway carriage without having paid his fare, the summons was dismissed with costs, and the action was brought to recover the expenses occasioned by such summons. On motion to set aside an order for a prohibition made by a Judge at Chambers,—*Held*, that the plaint was in substance a plaint for a properly made.

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committed the offence. An application was afterwards made for a warrant of distress to enforce payment of these costs, the hearing of which was adjourned by the magistrates on the ground of suggested fraudulent collusion between the plaintiff and John Hunt, the person really guilty, and who had been convicted since the former hearing. The plaintiff then commenced the above mentioned action in the County Court, to recover the expenses he had been put to. The defendants had never agreed to pay the monies sued for. On an affidavit of these facts *Coleridge, J.*, had ordered a writ of prohibition to issue to the County Court of Staffordshire.

The plaintiff and his attorney swore that the action in the County Court was brought to recover the expences incurred by the plaintiff, by reason of the culpable negligence and want of due care and diligence of the defendants in causing the plaintiff to be summoned before the magistrates at Longton: that the costs awarded did not include all the expences, and that the plaintiff did not seek damages, but only the recovery of the expences actually incurred by him.

Scotland now shewed cause.—The substance of the cause of action alleged, and not the form, must be looked at: *Legge v. Tucker (a)*. There is nothing in the relation of prosecutor and defendant, to make the prosecutor liable for mere want of care in instituting a prosecution. The plaint discloses no cause of action, except for a malicious prosecution, in respect of which the Judge of the County Court had no jurisdiction: 9 & 10 Vict. c. 95, s. 58. In *Chivers v. Savage (b)* the plaint was for a trespass by false imprisonment.

(a) 1 H. & N. 500.

(b) 5 E. & B. 697.

Huddleston, in support of the rule.—Whether the Judge of the County Court had jurisdiction or not must be determined by an inspection of the plaint. It may be, that the plaint does not disclose any cause of action at all. If not, the Judge of the County Court will give judgment for the defendants. No malice is charged; no damages are sought for injury to the feelings of the plaintiff, or for the inconvenience to which he has been subjected, or in respect of other matter for which damages would be given in an action for malicious prosecution. The plaintiff only seeks to recover for money paid and the like, and the plaint would be proved by evidence of a contract to pay the money claimed.

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POLLOCK, C. B.—I am of opinion that this rule must be discharged. The plaint is not to recover money agreed to be paid by the defendants. No contract or agreement to pay the money is alleged. The substance of it is, that Woolgar, on behalf of the Company, made a complaint against the plaintiff, whereby he was put to expence, which he calls on the Company to pay. No damages for loss of reputation are demanded; but whatever is comprised in the plaint may be recovered in an action for malicious prosecution. I am of opinion therefore that the order of my brother *Coleridge* was right. The plaintiff cannot, by putting down the items of his pecuniary loss, give jurisdiction to the judge of the County Court. If the plaint has any meaning, it is in substance a plaint for a malicious prosecution.

MARTIN, B.—The plaint is a mere evasion of the Act. The only action that could be maintained by the plaintiff is for a malicious prosecution. I doubt, however, if any

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action lies for a mere proceeding to recover a penalty before magistrates, which is in the nature of a civil proceeding.

BRAMWELL, B.—I concur, though not without considerable doubt. The defendants say that the plaint is either a plaint for a malicious prosecution or nothing; therefore it must be taken to be a plaint for a malicious prosecution. I am not sure that this argument is well founded; but I concur, because on looking at the facts we can see that under colour of a plaint, on which the Court may have jurisdiction, the plaintiff is seeking to make out a case of malicious prosecution.

WATSON, B.—I am of the same opinion. An action could only be supported on proof that the proceeding was taken maliciously and without any reasonable and probable cause. But the cause of action is not so stated in the summons and particulars. That however is, because the summons is an attempt to evade the provisions of the act of parliament.

Rule discharged.

MEMORANDUM.

In this Term The Right Honourable *James Stuart Wortley* resigned his office of Solicitor General in consequence of indisposition.

He was succeeded by *Henry Singer Keating*, Esquire, of the Inner Temple, one of her Majesty's counsel, who afterwards received the honour of Knighthood.

TRINITY VACATION, 21 VICT.

Judgt. aff. in Error
34 L. & 686
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 June 26.

NIXON v. BROWNLOW.

DECLARATION in scire facias, against the defendant as a shareholder in "The Kilkenny and Great Southern and Western Railway Company," on a judgment recovered by the plaintiff against that Company.

Plea.—That the defendant is not a shareholder in the Company.—Issue thereon.

At the trial, before *Martin*, B., at the London sittings after last Hilary Term, it appeared that in the year 1845 a Company was projected for making a railway from Kilkenny to Galway, in Ireland. The defendant executed the subscribers' agreement, and thereby he and the several other persons parties thereto of the first part each for himself, covenanted with the trustees that he had subscribed the sum set opposite to his name in the schedule for the purpose of making a railway to be called "The Galway and Kilkenny Railway Company," or by such other name as

The subscribers' agreement of a proposed Company stated that it was formed for making a railway, to be called "The Galway and Kilkenny Railway," and to commence at Kilkenny and terminate in the town of Galway: the capital to be one million in shares of 25*l.* each. The deed empowered the directors to abandon the undertaking, or any part thereof, and also to make application to parliament for an Act

for any of the purposes aforesaid: also to fix upon, and from time to time to alter or vary the termini, route, course, or line of the railway; and to determine whether and how far, and to what extent the undertaking should be carried into effect and deferred or abandoned: and in case any Act should authorize the construction of a part thereof, to make in any subsequent session application for the construction of the remainder. The defendant executed the deed as a subscriber for 150 shares and paid the deposit of 1*l.* 10*s.* per share. The directors applied to parliament, and in 1856 an Act passed which incorporated the Company by the name of "The Kilkenny and Great Southern and Western Railway Company," for making a railway from Kilkenny to Cuddagh: the capital of the Company to be 225,000*l.*, divided into 11,250 shares of 20*l.* each. After the Act passed the name of the defendant was placed on the register of shareholders for fifty shares of 20*l.* each.—*Held*, that the defendant was a shareholder in the incorporated Company, and liable as such to execution on a judgment recovered by a creditor against the Company.

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should be adopted by the directors, and that the railway should commence in the parish of St. John's in Kilkenny and terminate in or near the town of Galway, with a branch from the main line at or near Maryborough: that a capital of a million should be raised in shares of 25*l*. each, with power to the directors to increase such capital, or other the capital for the time being, provided the assent to such increase should be obtained from a majority of the subscribers, &c. The deed also contained the following provisions:—That the committee or directors should have full power “to abandon the said undertaking, or any part thereof, and also to make application to parliament in the ensuing session for an Act or Acts for all or any of the purposes aforesaid, and to renew, if necessary, such application in any subsequent session or sessions; and also to introduce, or to consent to the introduction in any act or acts of parliament, for which application may be made as aforesaid, of any such special or other clauses and provisions as to the said committee or directors may seem proper or desirable: and also to fix upon, and from time to time to alter or vary, the termini, route, course, or line of the said railway and the sites or spots of the stations, depôts and works connected therewith: and to determine whether and how far and to what extent the said undertaking should be carried into effect and deferred or abandoned; and in like manner what branches, if any, from the main railway shall form a part of the said undertaking; and in case any Act to be obtained in relation to the said undertaking shall authorize the construction of a part or parts thereof, the said committee or directors shall have power to make or support in any subsequent session or sessions such applications to parliament as they may deem advisable for the construction of the remainder of the undertaking or any part or parts thereof.” The defendant executed the deed as a subscriber for 150 shares, and paid the deposit of

1*l.* 10*s.* per share. The directors applied to parliament, and on the 7th August, 1856, the 9 & 10 Vict. c. cccl*x.* passed. That Act incorporated the Company by the name of "The Kilkenny and Great Southern and Western Railway Company," for the purpose of making a railway from Kilkenny by a junction with the Waterford and Kilkenny Railway to Cuddagh in the Queen's County, by a junction with the Great Southern and Western Railway. By sections 4 and 5 the capital of the Company was to be 225,000*l.* divided into 11,250 shares of 20*l.* each. At the first meeting of directors, duly held after the Act passed, the defendant's name was placed on the register of shareholders for fifty shares. By the 26th section of the Company's Act, the powers thereby granted for making the railway ceased in the year 1853. The plaintiff sought to recover for work done by him in engineering and surveying the line after the Company's Act passed; but it did not appear that the railway had been made. Evidence was adduced on the part of the defendant for the purpose of shewing that the name of the defendant had been improperly inserted on the register of shareholders.

It was objected on behalf of the defendant that, upon the facts proved, he was not a shareholder in "The Kilkenny and Great Southern and Western Railway." The learned Judge was of opinion that there was no evidence of fraud, and he directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

Bovill, in the following Term (April 21), moved for a rule nisi accordingly (*a*), on the ground that upon the facts proved the defendant was not a shareholder of the fifty 20*l.* shares in the Company, or of any shares, and never subscribed for such shares or to the undertaking for which

(*a*) He also moved for a new trial, on the ground that there was evidence that the defendant's name had been fraudulently in-

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serted on the register of shareholders, but the Court refused to grant a rule on that ground.

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the Act passed, and ought not to have been registered for such shares.

Unthank and Mellish shewed cause in the same Term (April 28).—The question is whether, upon the facts proved, the defendant is a *shareholder* in this Company. By the 3rd section of the 9 & 10 Vict. c. ccclx., certain persons therein named, and all other persons “who have *already subscribed* or shall hereafter subscribe to the undertaking,” shall be united into a company for the purpose of making the railway. The defendant has subscribed and executed a document, by which he agrees to become a member of the Company, whether as originally proposed or authorized by parliament. By the 8th section of “The Companies Clauses Consolidation Act, 1845,” “every person who shall have subscribed the prescribed sum or upwards to the capital of the Company, or shall otherwise have become entitled to a share in the Company, and whose name shall have been entered on the register of shareholders, shall be deemed a shareholder of the Company.” Where a person has executed the subscribers’ agreement, his name is properly put on the register of shareholders, notwithstanding he has sold his scrip before the Company’s Act passed: *The Midland Great Western Railway Company v. Gordon* (a). It is immaterial that the undertaking sanctioned by parliament is different from that to which the defendant subscribed. In *The Midland Great Western Railway Company v. Gordon* the subscribers’ agreement was for forming a company to make a railway from D. to M., and thence to A., and authorized the directors to do all the transactions necessary for forming a railway from D. to M. and A. It also bound the subscribers to submit to such regulations as might be imposed by the legislature. The Act afterwards obtained empowered the Company to buy and work a canal

(a) 16 M. & W. 804.

from M. to A., and to make a railway from D. to M. only, and it was held that the undertaking sanctioned by the Act was not so different from that pointed out in the subscribers' agreement as to save the subscribers from being bound by it. *The Midland Great Western Railway of Ireland v. Leech* (a) does not affect the present case: all that was there decided was, that assuming the directors had power to bind the subscribers by an amalgamation of the two companies, that power was never exercised. *The Cork and Youghal Railway Company v. Paterson* (b) is an express authority that persons who execute the subscribers' agreement are bound by the powers thereby conferred on the directors. There, two Companies, proposing to construct railways, which would necessarily interfere with each other, their respective subscribers' agreements empowered the respective managing committees or directors "to demise or sell the undertaking or any part thereof, or to amalgamate the same, or any part thereof, with any other railway or railways." In pursuance of the power thus conferred on them, the directors of the two Companies agreed to amalgamate and form one united Company, and this agreement was carried into effect by resolution made at board meetings of the respective committees, and by a deed executed by a competent number of the directors of each company: it was held that the power to amalgamate was vested in the two boards, and that those powers were well and effectively exercised; and that the Company so amalgamated might maintain an action for calls against a shareholder of either Company who had executed the parliamentary contract and subscribers' agreement. It is clear that the legislature, in passing the Company's Act, have regarded the subscription contract as a contract in respect of that line of railway which they sanctioned. Section 19, after reciting "that plans and sections of an intended railway from Kilkenny to

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(a) 3 H. L. Cas. 872.

(b) 18 C. B. 414.

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Ballinasloe, shewing the lines and levels thereof, and also books of reference," &c., "have been deposited with the clerk of the peace for the county of Kilkenny," &c.; "but it is proposed to make only so much of the said railway as lies between Kilkenny and the townland of Cuddagh," &c., enacts, that "it shall be lawful for the said Company,"—that is, the Company who deposited the plans and sections of the intended railway,—“to make and maintain so much of the said railway,” &c., as lies between Kilkenny and Cuddagh. If, on account of the difference between the undertaking proposed and that granted, the defendant is not a subscriber, then there is no such Company as that to which he subscribed. The subscribers must be provisionally registered as a Company before they can apply to parliament. When the defendant was registered as a shareholder, the directors were proceeding with the original scheme in the mode pointed out by the subscription contract. The legislature refused to grant to the Company powers to make the whole line at once, but it was competent to them to apply for further powers in the next session of parliament. The directors have not acted ultra vires, for the deed empowers them to alter the line of railway, and to determine to what extent it should be carried into effect. There is no difficulty as to the allotment of shares, for it may be made in exact proportion to the scrip held by each subscriber. The directors must necessarily have some power over that matter, since, before the Act passes, subscribers may become ineligible as shareholders by reason of bankruptcy or insolvency. There is no evidence that the just proportion of shares has not been allotted to the defendant.

Bovill and *Ogle* argued in support of the rule (May 5).—The defendant was a subscriber for 150 shares of 25*l.* each, in a Company for making a railway from Kilkenny to Galway: he never consented to take fifty shares of 20*l.* each in

a Company for making a railway from Kilkenny to Cudagh. It is true that the deed empowers the directors to abandon a portion of the line, but not to alter the number or amount of the shares. In *The Midland Great Western Railway Company v. Gordon (a)*, it did not appear that there was any alteration in the capital or amount of shares: it may have been that when the scheme was before parliament, they thought that the capital was not sufficient to carry out the whole line, and it is conceded that a mere alteration in the termini would not release the shareholders from their obligation. In such case it is a mere question of identity, viz., whether the undertaking subscribed by the parties who originally contemplated it was identical with that afterwards sanctioned by the legislature. But a person to whom shares are allotted in a projected Company with a proposed amount of capital, is not liable as a shareholder, if the directors commence operations before all that capital is subscribed for: *Fox v. Clifton (b)*, *Pitchford v. Davis (c)*, *The Galvanized Iron Company v. Westoby (d)*. The defendant was not a subscriber to the undertaking mentioned in the 3rd section of the 9 & 10 Vict. c. ccclx. By sections 4 and 5, the capital of the Company is to be 225,000*l.*, divided into 11,250 shares of 20*l.* each: the defendant has never subscribed for any portion of those shares. The Waterford and Kilkenny Railway Company were registered as subscribers to the original scheme, but the 9 & 10 Vict. c. ccclx. contains an express provision that they may become shareholders in the undertaking authorized by that Act. There is no authority that a person who subscribes to a projected Company with a proposed capital of 1,000,000*l.*, is bound to take any shares which the directors may allot him in an

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(a) 16 M. & W. 804.

(b) 6 Bing. 776.

(c) 5 M. & W. 2.

(d) 8 Exch. 17.

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undertaking with a reduced capital and amount of shares. The Act clearly contemplates future subscribers. In *The Midland Great Western Railway Company of Ireland v. Leeck* (a) all the Judges considered that the act of parliament did not amalgamate the two Companies, although it was founded on the subscription contract; and that it was discretionary with the directors whether they would admit the subscribers as shareholders or not. In *The Cork and Youghal Railway Company v. Paterson* (b), there was no sum named in the deeds as the capital of one of the original undertakings; and it was left to the directors to determine what were the interests of the subscribers to each Company; and what was their interest in the capital stock of the amalgamated Company. There, the directors allotted to the defendant shares of corresponding value in the new Company; here the directors have not registered the defendant for an amount equivalent to that for which he subscribed. Moreover, the defendant is not a "shareholder" within the meaning of the 36th section of "The Companies Clauses Consolidation Act, 1845;" for by the 37th section, if he paid under the execution more than was due from him for calls, he would have a right to be reimbursed out of the funds of the Company; but by the 26th section of the Company's Act, the power to make the railway has ceased, it not having been exercised within the time prescribed: *Kinnersly v. The North Staffordshire Railway Company* (c)—They also referred to *Smith v. Goldsworthy* (d), *Regina v. The Registrar of Joint Stock Companies* (e).

Cur. adv. vult.

MARTIN, B., now said.—This was a rule to enter a verdict for the defendant on a plea to a declaration in scire

(a) 3 H. L. Cas. 872.

(b) 18 C. B. 414.

(c) 6 Railway Cases, 662.

(d) 4 Q. B. 430.

(e) 10 Q. B. 839.

facias that the defendant was not a shareholder. The scire facias issued on a judgment obtained by the plaintiff against The Kilkenny and Great Southern and Western Railway Company, in respect of services done by him for the Company after the passing of the act of parliament which incorporated it. For the purpose of proving the defendant to be a shareholder, the plaintiff gave in evidence the subscribers' agreement and the register of shareholders. The subscribers' agreement contained an authority for the directors to abandon the undertaking, or such part thereof as they should think fit, and proceed to obtain an act of parliament in respect of any portion of the proposed line. It also appeared that in the year 1846 the directors applied to parliament, and the original line being intended to connect Kilkenny and Galway, they obtained an Act for making a portion of that line, viz., from Kilkenny to a station on the Great Southern and Western Railway at a place called Cuddagh in the Queen's County. As proof that the defendant was a shareholder, the plaintiff relied on the authority given by the subscription contract and this act of parliament, and the subsequent placing of the name of the defendant upon the register of shareholders. It was alleged on the part of the defendant that the register of shareholders was improperly made up, and that the defendant's name had not been fairly inserted in it. I thought that there was no evidence of that (a), and

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(a) On concluding the judgment his Lordship observed, with reference to the statement that the name of the defendant had been improperly placed on the register of shareholders, that the matter was fully investigated in a subsequent trial before him in an action against another shareholder of the same Company, when it appeared from the testimony of

several witnesses that there was not the slightest ground for supposing that any irregularity had been committed, but on the contrary that the act of parliament had been explicitly carried out: that the question of fraud was left to the jury, and they were of opinion that there was no fraud whatever.

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I directed the jury that, in point of law, the defendant was a shareholder if he executed the subscription contract, and his name had been subsequently inserted in the register of shareholders. An application was made for a new trial, on the ground that the defendant's name was improperly placed on the register of shareholders, but the Court were of opinion that there was no evidence of fraud, and they refused the rule on that ground, and granted it simply on the question whether or no the defendant was a shareholder. The point has been argued before us, and two cases were relied on for the purpose of establishing that the defendant was a shareholder, viz., *The Midland Great Western Company of Ireland v. Gordon* (a) and *The Cork and Youghal Railway Company v. Paterson* (b). It seems to us, that these cases are directly in point, and if the doctrine laid down in them be wrong, it must be set right by a Court of error. Two other cases were cited: one was *The Midland Great Western Railway Company of Ireland v. Leech* (c). That case has no bearing on the subject, but relates to an entirely different matter. The other case was *Kinnersly v. The North Staffordshire Railway Company* (d), which is also beside the question now under discussion, for it related to a point not made at the trial, as to the time having expired for carrying into execution the powers conferred by the Company's Act. The only question before us was whether the defendant was a shareholder in this Company, and the cases of *The Midland Great Western Railway Company of Ireland v. Gordon* and *The Cork and Youghal Railway Company v. Paterson* seem to us authorities directly in point. The rule must therefore be discharged.

Rule discharged.

(a) 16 M. & W. 854.
(b) 18 C. B. 414.

(c) 3 H. L. Cas. 872.
(d) 6 Railway Cases, 662.

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THE ATTORNEY GENERAL *v.* FITZJOHN and Another.

June 10.

THIS was an information by the Attorney General for duty payable by the defendant under "The Succession Duty Act, 1853." The question for the opinion of the Court was raised by a special verdict (in substance) as follows:—

After the passing of an act of parliament, made and passed A.D. 1796, intituled, &c., (36 Geo. 3, c. 52), and before the passing of another act of parliament, made and passed A.D. 1805, and intituled &c. (45 Geo. 3, c. 28), that is to say, on the 7th July, A.D. 1803, Dennis Herbert duly made and published his last will and testament in writing, and thereby gave and bequeathed to his sons George Herbert and Cornelius Herbert, their executors, &c., 5000*l.*, upon trust to place out at interest that sum upon real or government securities, and to pay the interest, dividends and annual income thereof to his daughter, Ann Herbert, during her life; and upon further trust, after her death, for all and every her child, or children if more than one, equally to be divided amongst them, share and share alike; and if only one such child, then for such one child, to be a vested interest or interests in such child or children as should be a son or sons at his or their age or ages of twenty-one years; and in such child or children as should be a daughter or daughters at such age or ages, or at her

A testator bequeathed to trustees 5000*l.* in trust to invest the same and pay the dividends to his daughter during her life, and upon further trust after her death for her children, equally to be divided amongst them. The testator died in 1803, at which time no duty was payable on legacies to children or grandchildren. His daughter died after "The Succession Duty Act, 1853," came into operation. By the 2nd section of that Act, "every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property upon the death of any person dying after the commencement

of that Act, shall be deemed to have conferred, or to confer, on the person entitled by reason of such disposition a 'succession.' " By section 18, no duty shall be payable "by any person in case of a succession, who, if the same were a legacy would be exempted from the payment thereof under the legacy duty Acts."—*Held*, first, that the interest of the testator's grandchildren in the property bequeathed to them was a "succession" within the meaning of that Act: Secondly, that it was not within the exemption of the 18th section, since that applied only to express exemptions by former Acts, and consequently that succession duty was chargeable.

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or their respective days of marriage, whichever should first happen; but not to be payable until after the decease of his the said testator's said daughter Ann Herbert: And upon further trust, immediately after the decease of his said daughter, and in the meantime until the share or respective shares of her child or children of and in the said trust money should become vested and payable, to pay, apply, and dispose of the interest, dividends and annual income of each such child's share therein for or towards his or their maintenance and education. (Then followed a power, after the death of Ann Herbert, or in her life time if she should so direct in writing, to apply one third of the expectant share of any child for his or her advancement.) And further, in case there should not be any child of his said daughter who should live to attain a vested interest in the said sum of 5000*l*., then that the said trustees should hold the same upon certain other trusts in the said will mentioned. And the testator appointed the said George Herbert sole executor of his will. The testator, on the 1st November, A.D. 1803, died, without having in anywise altered or revoked his will, and the same was, on the 1st December, A.D. 1803, in the Prerogative Court of the Archbishop of Canterbury, duly proved by the said George Herbert as such executor, who then and there took upon himself the burthen of the execution thereof, and who, as such executor, assented to the said legacy and bequest of 5000*l*. On the 1st April, A.D., 1804, the said George Herbert departed this life, and after his death, that is to say, on the 1st May, A.D., 1804, the said sum of 5000*l* was, by the said Cornelius Herbert, who was possessed thereof as such surviving trustee, duly invested, in compliance with the trusts of the said will, in the purchase of 5240*l*. 17*s*. 10*d*. New 3 per cent Bank Annuities. Cornelius Herbert, on the 1st of January, A.D., 1850, duly made and published

his last will and testament in writing, and thereby bequeathed the said sum of 5240*l.* 17*s.* 10*d.* New 3 per cent. Bank Annuities to the defendants upon the trusts aforesaid, and thereby appointed the defendants his executors, and then died without having altered or revoked his will. And the defendants, after the death of the said Cornelius Herbert, duly proved his will as such executors, and took upon themselves the burthen thereof and of the trusts thereof, and as such executors caused the said sum of 5240*l.* 17*s.* 10*d.* to be transferred into their names upon the trusts aforesaid. Ann Herbert survived Dennis Herbert, and after his death, that is to say, on the 1st January, A.D. 1810, married Daniel Hawkins, and had by him six children. Two of the children died in the lifetime of Ann Herbert, without having attained the age of twenty-one years or been married; two other of the children, that is to say Dennis Hawkins and William Hawkins, respectively attained the age of twenty-one years, and died in the lifetime of Ann Herbert, and the remaining two of the children, that is to say George Hawkins and Mary Ann Hawkins, attained the age of twenty-one years, and survived the said Ann Herbert, who died after the passing and coming into operation of the Succession Duty Act, 1853, that is to say, on the 1st June, A.D. 1854. The defendants, after the death of Ann Herbert, that is to say, on the 1st December 1854, as such trustees as aforesaid, sold the last mentioned Bank Annuities with full notice of the premises, and then paid over the proceeds, amounting to 4900*l.*, in equal shares to the said George Hawkins and Mary Ann Hawkins, and to the legal personal representatives of the said Dennis Hawkins and William Hawkins, without having retained or paid or accounted for any succession duty in respect thereof. —The special verdict then found that the succession duty amounted to 50*l.*, and concluded by stating, that if the

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Court should be of opinion that the defendants were liable to pay the said sum, then they owed the money.

The Attorney General (with whom were *Pigott*, Serjt., *Beavan* and *Thring*), for the Crown.—The 36 Geo. 3, c. 52, did not extend to legacies by parents to children or their descendants. Duty was, for the first time, imposed on such legacies by the 45 Geo. 3, c. 28, which passed in the year 1805. The Succession Duty Act, 1853, was framed on this principle, that it should not affect any case provided for by the Legacy Duty Acts, and that where those Acts contain an express exemption from duty, that exemption should continue; but that the Succession Duty Act should embrace cases to which the Legacy Duty Acts do not extend. For instance, by the 29th and 30th sections of the Succession Duty Act, the interest of a succession is charged with duty “so far as the same shall not be chargeable with duty under the Legacy Duty Acts.” The interest now sought to be taxed is “a succession” within the meaning of the 2nd section of the Succession Duty Act (a). At the time that Act passed, there was a disposition of property, by reason whereof the testator’s grandchildren

(a) 16 & 17 Vict. c. 51, s. 2.—“Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of

any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a ‘succession;’ and the term ‘successor’ shall denote the person so entitled; and the term ‘predecessor’ shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.”

have become beneficially entitled to a sum of money upon the death of their mother after that Act came into operation. The 18th section (a) is relied on as exempting this legacy from duty. That section provides that no duty shall be payable under that Act "by any person in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the Legacy Duty Acts." That enactment, however, was only intended to continue cases of specific exemption, as legacies to the royal family, or husband or wife of the deceased: 55 Geo. 3, c. 184, sched., part 3, tit. "Legacies;" or legacies of books and works of art to bodies corporate and other societies: 39 Geo. 3, c. 73; or legacies of depositors in a savings bank: 9 Geo. 4, c. 92; or gifts for charitable purposes under the Irish Act 56 Geo. 3, c. 56. This is not the case of an *exemption*, for it never was within the operation of the Legacy Duty Acts, because, at the time of the testator's death, no duty was imposed on such a legacy. But

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(a) Section 18.—"Where the whole succession or successions derived from the same predecessor and passing upon any death to any person or persons shall not amount in money or principal value to the sum of 100*l.*, no duty shall be payable under this Act in respect thereof or of any portion thereof; and no duty shall be payable under this Act upon any succession, which, as estimated according to the provisions of this Act, shall be of less value than 20*l.* in the whole; or upon any monies applied to the payment of the duty on any succession according to any trust for that purpose; or by any person in respect of a succession, who, if

the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the Legacy Duty Acts; and no person shall be charged with duty under this Act in respect of any interest surrendered by him or extinguished before the time appointed for the commencement of this Act; and no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property."

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though not liable to duty under the Legacy Duty Acts, it is chargeable as a succession, under the Succession Duty Act, which has a retrospective operation to any definite extent. Thus, if a person succeeded to a legacy as tenant for life, in the year 1794, though no duty was then payable, yet if he died in the year 1854, the interest of his successor would be chargeable with duty. There is nothing in the language of the 18th section of the Act to exempt this particular legacy from the rule laid down in the 2nd section.

J. Brown, for the defendant.—The Succession Duty Act is not only inapplicable to cases within the Legacy Duty Acts; but it leaves those Acts as they were, both as regards the charge and the person and thing chargeable. The words, “exempted from payment of duty” in the 18th section of that Act, mean “free from payment of duty.” The construction of the other side necessitates the introduction of the word “expressly.” The 29th and 30th sections furnish an argument in favour of that view, for if the other construction were correct there would be no occasion for those clauses, which are only necessary on the assumption that the 45 Geo. 3, c. 28, contains solely the charge and an express exemption. The Succession Duty Act was never intended to interfere with the Legacy Duty Acts; but merely to impose on succession to real property a duty similar to that imposed by those Acts on personal property. Though the 2nd section uses the words “beneficially entitled to any property,” the 10th section, which imposes the duty, relates only to real property, and leaves personalty chargeable as before, under the Legacy Duty Acts. This legacy is within the exemption of the 18th section, for it was “exempted from the payment of duty under the Legacy Duty Acts.” In Webster’s Dictionary the definition of the word “exempt” is “free from any charge, duty,” &c. The 2nd

section of the 45 Geo. 3, c. 28, which passed in 1806, and first imposed a duty on legacies to children and their descendants, contains an express exemption from duty in respect of legacies payable out of the estate of any person dying before the passing of that Act. The 3rd section contains a similar exemption in respect of legacies to husband or wife, or the Royal Family. The 48 Geo. 3, c. 149, sched., part 3, tit. "Legacies," contains, in addition to the two last mentioned exemptions, all legacies exempted from duty by the 39 Geo. 3, c. 73. The 55 Geo. 3, c. 184, sched., part 3, tit. "Legacies," imposes a different rate of duty where the testator died before and after the 5th of April, 1805; in the former case no duty is payable by children or their descendants. The 8th section incorporates with that Act the provisions of former Acts relating to duties, so far as the same are applicable. The 18th section of the Succession Duty Act was intended to continue the same exemptions from duty as under the previous Acts.

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The Attorney General, in reply.—This interest being a "succession" within the 2nd section of the Succession Duty Act, the onus is on the other side to shew that it is exempt from duty. The principle embodied in the Act applies not only to real property, but to all dispositions of property inter vivos, whether testamentary or otherwise. It was intended to extend to cases not provided for by the Legacy Duty Acts. "Exempted" means "taken out of" or "excepted from." The 2nd section of the 45 Geo. 3, c. 28, merely declares that the Act shall have a prospective and not a retrospective operation. In the 44 Geo. 3, c. 98, sched. (A.), there are various cases of "special exemptions." The 55 Geo. 3, c. 184, included persons who were not subject to legacy duty before the 5th of April, 1805; but it would not be correct to say that they were exempted, neither

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would it be correct to say that persons who died before the 19th of May, 1853, were exempt from succession duty. According to the argument on the other side, if real estate was settled to the use of a wife on the death of her husband, and on the wife's death to the use of her children, no duty would be payable on the death of the husband when the wife succeeded, or on the death of the wife when her children succeeded.

Cur. adv. vult.

The judgment of the Court was now delivered by

WATSON, B.—This was an information filed by her Majesty's Attorney General, to recover from the defendant succession duty upon a sum of money invested in the funds under and in pursuance of the will of Dennis Herbert, who died on the 1st of November, 1803.

The facts of the case were stated in a special verdict, by which it appears that Dennis Herbert, in the month of July, 1803, made his will and died in November 1803. By his will he bequeathed to trustees a sum of 5000*l.*, in trust to invest that sum in the funds and to pay the dividends to his daughter, Ann Herbert, for life, and then as to the principal sum, upon trust for all her children equally. The defendants are the executors of the surviving trustee appointed by the will. Ann Herbert married and had several children. She died in June 1854, after the Succession Duty Act came into operation, and her children then became entitled in possession to this money.

The question upon these facts is, whether or not succession duty is chargeable on this money, and we are of opinion that it is. This turns on the 2nd and 18th sections of the Succession Duty Act, 16 & 17 Vict. c. 51. The 2nd section enacts, that "Every past or future disposition of

property, by reason whereof any person has or shall become beneficially entitled to any property or income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession, or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "*succession*," and the term "*successor*" shall denote the person so entitled; and the term "*predecessor*" shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." It is obvious that this is a past disposition of property, for the Act is general and the term "*disposition*" extends to all modes of disposition, whether by will, or by deed or settlement inter vivos. The children of Ann Herbert, after the time appointed for the commencement of this Act, became beneficially entitled to this money in possession, and it then devolved upon them by the death of Ann Herbert and thereby became "*succession*," within the meaning of that Act, and chargeable with *succession duty*.

But the contest on the part of the defendants was, that this claim came within the exemptions provided for by the 18th section of the same Act. It may be doubtful whether that section applies, as it only mentions "any person in respect of a succession who, *if the same were a legacy*,"—in terms therefore only including successions which are not legacies, while in this case the succession is a legacy. Assuming it to apply, we agree with the construction put by the

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Crown on this section of the statute. The material part of that section is in these words, that "no duty shall be payable by any person in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be *exempted* from the payment in respect thereof under the Legacy Duty Acts." The section then excepts persons in respect of interests surrendered or released before the Act came into operation; and also that "no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties shall be charged also with the duty granted by this Act, in respect of the same acquisition of the same property." These legacy duties were first imposed in 1796, but until 1805 no legacy duty was imposed on legacies bequeathed to children, or the descendants of children of the testator. For the first time such duty was imposed by the statute 45 Geo. 3, c. 28. That Act, and the subsequent Acts imposing legacy duty, are all prospective, and therefore as the testator, Dennis Herbert, died before the passing of this Act, no legacy duty was imposed thereon or payable in respect of the devolution of any interest therein at the time of the passing of the Succession Duty Act in 1853. It was argued on the part of the defendants, that the meaning of the word "*exempted*" was, that the legacy in question was not chargeable by any former Acts with legacy duty, and "the exemption" should read "free from" or not charged with the payment of any duty under the Legacy Duty Acts. On the other hand it was contended by *The Attorney General*, that the word "*exempted*" was to be construed in its legal sense, and that it applied only to exemptions expressly provided for by the Legacy Duty Acts; and that the Succession Duty Act intended, in its retrospective operation, to embrace all acquisitions of property by reason of death after the Act

came into operation, and consequently the succession duty was chargeable in this case. We think that this is the correct construction of the Act, assuming section 18 to apply to this case. By the 2nd section of the 45 Geo. 3, c. 28 (which Act first imposed the duty on a legacy to a child or to the descendant of a child), the duty is not chargeable on legacies of a person dying before the passing of that Act. The clause seems to be superfluous, merely providing that the Act should not be retrospective. It is impossible to call this section an exemption from the duty. The Legacy Duty Acts, 48 Geo. 3, c. 149, Schedule, part 3, "Legacy," and the 55 Geo. 3, c. 184, which repeals all former Acts, in Schedule, part 3, "Legacies and Successions" divide the duty into two classes, those where the testator died before the 5th April, 1805, and those where the testator died after that period, and here as in former Acts are under the head "exemptions" legacies devolving to or for the benefit of husband or wife, or the Royal Family, and legacies bequeathed to bodies corporate or other public bodies, and we think that the exemptions in the 18th section of the Succession Duty Act apply to these legacies expressly exempted. The particular object of this exemption was to put dispositions by deed, in the retrospective operation of the Act, in the same condition as legacies.

We think that this case falls within the provisions of the 2nd section, and is either not within the 18th section of the Succession Duty Act, or if so, is not within any of the exemptions contained within the 18th section, and therefore the Crown is entitled to judgment for the succession duty on this fund.

Judgment for the Crown.

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*1. 8. 1. 4. 2 in P. 1. 1. 1.
3 Ad. 1. 1. 675.*

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The plaintiff by permission of a canal Company, made a communication from the canal to his own premises, by which water got to those premises, and with which water he fed the boilers of his engine. The defendant, without any right or permission from the Company, fouled the water in the canal, whereby the water as it came into the plaintiff's premises was fouled, and by the use of it the plaintiff's boilers were injured.—*Held*, that the plaintiff might maintain an action against the defendant for thus fouling the water.

A declaration alleged that the plaintiff was possessed of steam-

engines and boilers, and had used and enjoyed the benefit and advantage of the waters of a certain canal to supply the same, and which waters *ought to have flowed without the fouling* thereafter mentioned: yet the defendant wrongfully discharged into the water of the canal foul materials and thereby rendered the waters foul, whereby the plaintiff's engines and boilers were injured.—*Held*, that the declaration was good, for though there may be no right to water, there may be a right, if it comes or is sent, to have it come or sent without pollution.

THE declarations stated that the plaintiffs were possessed of coal mines, and steam engines and boilers for working the said mines; and used, had and enjoyed the benefit and advantage of the waters of a certain branch canal, near to the said engines and boilers, to supply the same with water for working the same, and for other necessary purposes, and which said waters of the said branch canal had been used, and then ought, to have run and flowed, and been without the disturbance, fouling and pollution herein mentioned: Yet the defendant knowing the premises, and after the 10th November, 1853, wrongfully discharged and poured into and mixed with the said waters of the said branch canal, near to the said engines and boilers of the plaintiffs, and the place in the said canal from which the supply for the same was drawn, quantities of foul, noxious, impure, and offensive materials, to wit, refuse from chemical works, muriatic acid, and other dirt, filth and impurity, and thereby rendered the said waters foul, dirty, noxious and injurious to the said engines and boilers, and impure and unfit for working the same, and for the said other necessary purposes, and the said engines and boilers of the plaintiffs, in and about which the said water was so used, were thereby greatly injured and deteriorated in value, and the plaintiffs

were put to much expence in repairing and cleansing the same, and were prevented from using the said engines and boilers, and working their said mines so effectually and well as they would otherwise have done.

Pleas.—First: Not guilty. Secondly: that the waters of the said branch canal ought not to have run and flowed, or been without the disturbance, fouling, or pollution mentioned.

Replications joining issue on the pleas.

The cause came on for trial before *Platt, B.*, at the Liverpool Summer Assizes, 1855, when a verdict was found, by consent, for the plaintiff, subject to a special case to be stated by an arbitrator, to whom the cause was referred, to ascertain and decide on the facts. The arbitrator found the first issue for the plaintiff, with 65*l.* damages, and with respect to the second issue, he found the facts, (so far as material), as follows:—

Prior to the 1st January, 1823, a canal, called the Leeds and Liverpool Canal, with a towing path on the north side of it, had been made under the provisions of several acts of parliament, in and upon lands belonging to W. Anderton.

By indenture, dated the 1st January, 1823, made between the said W. Anderton of the one part, and R. Swarbrick of the other part, the said W. Anderton, demised, granted and leased to the said R. Swarbrick such parts of two coal mines, called the Wigan Five Foot Mine and the Wigan Four Foot Mine, as lay within the depth of 110 yards from the surface of the land (the boundaries whereof are in the said indenture particularly described); together with full and free liberty, power, licence and authority to and for the said R. Swarbrick, the better to enable him to ship his coal, to make at his own costs and charges, and use, during the continuance of the thereby granted term, a sluice or cut, not exceeding the length of 200 yards nor the breadth of

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twenty yards from the Leeds and Liverpool Canal into the close of the said W. Anderton, called the Bowry pasture; and to make dams and reservoirs of water, and to have and use, as far as may be necessary, all waters and watercourses belonging to the said lands; and to make or sink any pit or pits, shaft or shafts, &c.: habendum, from the 3rd May, 1822, for the term of fifty years.

In exercise of the powers contained in the said deed, R. Swarbrick sank several pits, and erected several engines for working and getting so much of the said Five Foot Mine and Four Foot Mine as were demised by the said deed; he also made a cut or canal from the Leeds and Liverpool Canal into the said close, called the Bowry pasture.

After R. Swarbrick parted with his interest in the demised premises, as hereinafter mentioned (and before the 1st January, 1847), his successors in title made another cut or canal from the Leeds and Liverpool canal into the said close called the Bowry pasture. The engine of the plaintiffs' pit, called the Engine Pit, was supplied with water from this cut or canal, from the time it was made down to the year 1847.

By a variety of mesne assignments, and ultimately by a deed of the 22nd of April, 1835, the mines of coal and premises comprised in and demised by the deed of the 1st January, 1823, together with all rights, liberties, &c., were assigned to James Whaley, whose estate and interest therein vested in the plaintiffs prior to the year 1847, and they have ever since been and still are entitled thereto.

By a deed dated the 1st January, 1847, made between the said W. Anderton of the one part, and J. Swindells, W. Lancaster (and other persons) of the other part, after reciting the deed of the 1st January, 1823, it was witnessed that W. Anderton, did grant, demise and lease to the said

J. Swindells and W. Lancaster, &c., certain parts of the mine of coal, called King Coal Mine (the boundaries whereof are therein particularly described), with full and free liberty, power, licence and authority (inter alia) to erect engines and make dams and reservoirs, and to collect water therein to work the said engines, and to have and use, so far as might be necessary for the purpose of the said demise, all waters and watercourses belonging to the said W. Anderton, and to sink pits, &c.: habendum from the date of the said deed for the term of seventy-four years.

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In the same year (1847) the lessees named in the deed of the 1st January, 1847, made and constructed on the lands of the said W. Anderton the cut or canal, hereinafter called the Ince Hall Canal, and they continue to use it until the "Ince Hall Coal and Canal Company" hereinafter mentioned was formed, in the year 1848.

In the year 1847 (soon after the Ince Hall Canal was made), the plaintiffs asked permission of Mr. Lancaster, one of the lessees named in the deed of the 1st January, 1847, to make a small cut or sewer from their Engine Pit into the said Ince Hall Canal, for the purpose of getting water out of the said canal with which to supply the engine at that pit, instead of getting it, as they had theretofore done, out of their own cut or canal. Mr. Lancaster stated that he had no objection, provided the plaintiffs did him and his co-lessees no damage; and thereupon the plaintiffs made a cut into the Ince Hall Canal.

In January, 1848, a completely registered company was formed, called "The Ince Hall Coal and Canal Company," and from that time to the present the Ince Hall Canal, and the mines and premises comprised in and demised by the deed of the 1st January, 1847, have been in the possession of and been used and worked by the Company.

No objection was ever made to the plaintiffs' taking water

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out of the Ince Hall Canal by means of the cut, so as aforesaid made by the plaintiffs, either by the lessees named in the deed of the 1st January, 1847, or by the "Ince Hall Coal and Canal Company."

The cut, so as aforesaid made by the plaintiffs, into the Ince Hall Canal was covered over, but the Ince Hall Coal and Canal Company were cognizant of its existence and of the fact that the plaintiffs by means of it got water for their Engine Pit engine.

Ever since the year 1846, the plaintiffs' Engine Pit engine has been used for the purpose of working some portion of the Five Foot Mine or of the Four Foot Mine demised by the deed of the 1st January 1823, and down to June, 1854, that engine was supplied with water in the manner and by the means already mentioned.

By a deed bearing date the 13th November, 1850, made between the said W. Anderton of the one part, and John Swindells and John Williams of the other part, the said W. Anderton did demise and lease unto the said J. Swindells and J. Williams a piece of land (therein described), together with the ways, waters, watercourses, liberties, easements and appurtenances to the same belonging (except all mines of coal): habendum for the term of 999 years from the date of the deed: subject nevertheless to the said deeds of the 1st January 1823, and 1st January, 1847.

In the same year (1850) Swindells and Williams, the lessees named in the deed of the 13th November, 1850, erected some chemical works upon the piece of land demised by that deed, from which works a quantity of water containing some muriatic acid was carried, by means of a drain, into the Ince Hall Canal. The muriatic acid so sent into the Ince Hall Canal during the time that Swindells and Williams occupied the said chemical works was not found to do any injury to the plaintiffs' Engine Pit engine.

In the year 1853, the defendant became and has ever since been the tenant of the said chemical works. He commenced working them on the 9th July in that year, and has ever since continued to use them for the purpose of making soda ash, muriatic acid and bleaching liquor. Owing to the manner in which the defendant carried on his manufactory, a good deal more muriatic acid found its way from the said chemical works into the Ince Hall Canal after his tenancy commenced than had been the case previously, and upon several occasions the quantity was so great that the water in the Ince Hall Canal by reason thereof injured the machinery and boilers of the plaintiffs' said engine, which was then so as aforesaid supplied with the said water. The plaintiffs in consequence discontinued feeding the engine with the water obtained from the Ince Hall Canal, and commenced feeding it with water obtained, by means of pipes, from the plaintiffs' own cut or canal.

The questions for the opinion of the Court are :

First, whether, upon the facts stated, the verdict upon the issue joined on the second plea ought to be found for the plaintiffs or the defendant. If for the defendant, the second question is, whether or not the plaintiffs are entitled to judgment notwithstanding such verdict, on the ground that the second plea is bad in substance : but if for the plaintiffs, the second question is whether or not the judgment should be arrested on the ground that the declaration is bad in substance.

Milhoard (*Watson* with him) argued for the plaintiffs in Hilary Vacation 1856, (February 11th).—The plaintiffs are entitled, as against the defendant, to the use of the water of the Ince Hall Canal in an unpolluted state. First they have a right under the indenture of the 1st

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January, 1823, whereby the owner of the soil granted to them full power and authority "to make dams and reservoirs, and to collect water therein to work their engines;" "and to have and use, so far as might be necessary, all waters or watercourses belonging to the said lands." Secondly, the plaintiffs have a right to the use of the water, under the licence granted to them by the Ince Hall Coal and Canal Company. Thirdly, they are entitled by reason of possession, as against a wrong-doer. In *Mason v. Hill* (a) Lord Denman C. J. in delivering the judgment of the Court said:—"The position, that the first occupant of running water for a beneficial purpose, has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injury to real property, possession is a good title as against a wrong-doer; and the owner of the land who applies the stream that runs through it, to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill: *The Earl of Rutland v. Bowler* (b)." In *Magor v. Chadwick* (c), the Court of Queen's Bench held that the law of watercourses is the same whether natural or artificial. Though that doctrine was not approved of in *Wood v. Waud* (d), yet the observations of the Court as to *Magor v. Chadwick* apply here, viz. that "in that case the action was not brought against the party in whose land the artificial watercourse commenced, nor any one claiming under him, and he had not put an end to it by altering the mode of working his mines; but what is more important, the action was not brought for abstracting, but for fouling the water, a species of injury

(a) 5 E. & Ad. 1.

(b) Palmer, 290.

(c) 11 A. & E. 571.

(d) 3 Exch. 748.

which does not stand on the same footing; for though the possessor of the mine might stop the stream, it does not follow that he, or any other, could pollute it whilst it continued to run." [*Alderson, B.*, referred to *Northam v. Bowden (a)*.] A parol licence to divert water, which has been acted upon by the person to whom it was given and expence incurred in consequence, is irrevocable: *Liggins v. Inge (b)*. If the defendant, instead of polluting the water, had cut away the bank, so that it was prevented from reaching the plaintiffs' mine, he would have been liable to an action. The plaintiffs' title is good against every one but the owners of the canal.

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Atherton (Hindmarsh with him), for the defendant.—First, the lessee under the deed of the 1st January, 1847, had no power to construct a branch canal for the purpose of navigation; therefore the construction of this branch canal was a wrongful act. But assuming that it was not, the plaintiffs had no right to the use of the water. The case bears no analogy to that of a chattel injured by a person while in the hands of a bailee. Mere possession of a chattel is sufficient to enable a bailee to maintain an action against a wrong-doer, for whilst he has possession of the chattel, his title is as complete as that of the real owner. But in order to bring the case of water within that principle, it ought to appear that the water, which is the subject-matter of complaint, is the identical water which the owner allowed the party complaining to take. The right of a riparian owner is not a possessory right until he has appropriated the water. [*Martin, B.*—If a person allows his neighbour to water his cattle in his pond, and a third person poisons the water whereby the cattle

(a) 11 Exch. 70.

(b) 7 Bing. 682.

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die, would he not be responsible?] The fouling of the water was not wrong as against the plaintiffs; for they had no title to the water at the time it was fouled; and the allowing foul water to flow into their pit was their own act. Suppose the defendant had diverted the water at a distance from the plaintiffs' pit, would they have had any right of action? A person seeking to recover damages must shew that he has a legal right; but here the plaintiffs had no right to the water until they took it, and before they did so the water was fouled. It is the same as if the plaintiffs had fetched the foul water from the canal in a bucket and put it in their cistern.—Secondly, the plaintiffs had no right to the water under the licence from Lancaster. That licence was revoked by the assignment of the mines and premises comprised in the deed of the 1st January, 1847, to the Ince Hall Coal Company. The case does not find that the Company were aware that the plaintiffs used the water and assented to it. The law as to natural surface streams was fully considered in *Embrey v. Owen* (a), but it has little application to this case. *Arkwright v. Gell* (b) and *Greatrex v. Hayward* (c) shew that the law is not the same with respect to artificial and natural water courses.—Thirdly, the declaration is bad on the face of it. Where one person claims a benefit from the land of another, he is bound to shew the manner in which he claims it: *Hilton v. Whitehead* (d).

Cur. adv. vult.

The judgment of the Court was now delivered by

BRAMWELL, B.—We are of opinion judgment should be

(a) 6 Exch. 353.

(c) 8 Exch. 291.

(b) 5 M. & W. 203.

(d) 12 Q. B. 734.

for the plaintiff, though not without considerable doubt, arising from the form of the declaration, the ambiguity of which has hitherto prevented our coming to a determination on the case.

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The facts material to be mentioned are, that the plaintiff, by permission of a canal company, made a communication from the canal to his own premises, by which water got to those premises, and with which water he fed his boilers; that the defendant fouled the water in the canal, whereby the water as it came into the plaintiffs' premises was fouled, and by the use of it the plaintiffs' boilers were injured; the defendant having no right or permission to do this from the canal owners.

We think these facts establish a cause of action in the plaintiff. The plaintiff had, by permission of the canal owners, got possession of a certain quantity of water, which he was entitled to pump up from his cistern or reservoir, as much as he would have been entitled to use it if he had taken it in a pail or bucket. The consequence of his doing so, that is of emptying his cistern or reservoir, is that other water flows in from the canal to supply its place. This water the defendant has fouled; and consequently by his act foul water flows into the plaintiffs cistern, the plaintiff only contributing thereto by removing the water already there; which, as we have said, he had a clear right to do. This being without justification by the defendant, gives the plaintiff a cause of action.

It is true that the great injury the plaintiff sustains, is by his own act in feeding the boilers with the fouled water; but he was not bound to let it remain in his cistern, and we do not know that merely pumping it away would have been less costly than using it as he did. Besides, it is to be observed, there is no question on the plea of not guilty

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or the amount of damages. But there is an allegation in the declaration, traversed by the defendant, viz. that the water "ought to flow without being fouled in the canal." We consider this to mean, not an assertion of title in the plaintiff, but that the defendant had no right to foul the water there. In the result then, we think the declaration good, and the allegation traversed proved, and consequently give judgment for the plaintiff.

We give no opinion on many of the questions discussed on the argument; particularly on whether the plaintiff had any possessory title to the water in the canal, so that if the defendant had stopped its flow to the plaintiff, or if the plaintiff, in order to get the water, had to go to the canal with a bucket or engine and draw it foul from the canal, any action would have been maintainable. Our opinion proceeds, as we have stated, on the ground that the defendant caused foul water to flow on to the plaintiffs' premises without right to do so. And this opinion is warranted by the cases cited, which shew that though there may be no right to water, there may be a right, if it comes or is sent, to have it come or sent without pollution.

Judgment for the plaintiff.

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June 26.

ACTION for money paid.—Plea: never indebted.

At the trial before *Channell B.*, at the Middlesex sittings in last Trinity Term, it appeared that the action was brought to recover a sum of money paid by the plaintiff to the landlord of the defendant, on account of rent due from him. In order to prove that the money was paid at the defendant's request, the plaintiff tendered in evidence the following document given to the defendant's landlord, which was unstamped—

“August 2.—According to Mr. Halkett's request, the land at Blackfordsby under Mr. Elstead, I will be bound for till next Lady Day.—Rent 48*l*.”—

The following document given by the plaintiff to the defendant was held to require a stamp as an agreement: “August 2.—According to Mr. H.'s (the defendant) request, the land at B. under Mr. E., I will be bound for till next Lady Day.—Rent 48*l*.”

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It was objected on behalf of the defendant, that the document was a guarantee and not admissible in evidence for want of a stamp. The learned Judge was of that opinion; and nonsuited the plaintiff.

J. Walter Smith moved to set aside the nonsuit and for a new trial on the ground of the improper rejection of the evidence (June 12th).—First, the document in question is not a guarantee within the meaning of the 4th section of the Statute of Frauds. It is not addressed to Elstead, nor does it purport to render the plaintiff liable to him, but is a mere undertaking by the plaintiff to be answerable for rent, not to the person to whom it is due, but to the person who is liable to pay it. The 4th section of the Statute of Frauds only contemplates promises made to the person to whom another is liable: *Eastwood v. Kenyon* (a), *Smith on*

(a) 11 A. & E. 438.

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Contracts, p. 86. Secondly, before the Mercantile Law Amendment Act 1856, (19 & 20 Vict. c. 97,) this document would have been clearly void as a guarantee, inasmuch as no consideration is expressed on the face of it, nor can any be implied from its terms, as in *Newbury v. Armstrong* (a). Therefore, before that Act, it would have been admissible without a stamp as an imperfect guarantee. By the 3rd section of that Act, the consideration for the promise need not appear in writing, but it must nevertheless be proved. The effect of that enactment is, not to render the party liable without proof of consideration, but only to prevent his being exempt from liability because the consideration does not appear on the face of the instrument, either expressly or by necessary inference. The document itself does not constitute an entire agreement, but the liability depends partly on it, and partly on evidence aliunde. Therefore, if a stamp is necessary, a document which would be admissible without a stamp, as an imperfect guarantee, would become inadmissible immediately if evidence was given of its consideration. It is only as an agreement that this document can require a stamp; it is not a perfect agreement, and cannot be said to require a stamp merely because sect. 3 of the Act renders it a good guarantee and dispenses with the necessity of its being a good agreement.—He also referred to *Alexander v. Barker* (b);

Cur. adv. vult.

CHANNELL, B., now said.—This was a motion to set aside a nonsuit. The cause was tried before me at the sittings in last term, and the ground of the application was the improper rejection of evidence tendered on behalf of the plaintiff. The action was brought to recover money

(a) 6 Bing. 201.

(b) 2 C. & J. 133.

paid by the plaintiff on account of rent due from the defendant to his landlord, and which the plaintiff alleged that he had become liable to pay under the document tendered in evidence. That document appeared to me a guarantee rendering the plaintiff liable for the rent to become due from the defendant up to a day named. I thought that the document required a stamp, and after consulting my brother *Martin*, who agreed with me, I rejected it. My ruling was objected to on the ground that the document was not a binding agreement; and the principal objection urged was, that if the document was considered with reference to the state of the law before the passing of the Mercantile Law Amendment Act, there was no sufficient consideration apparent on the face of it, so as to render it a binding guarantee. It was also argued, that though under the 3rd section of the Mercantile Law Amendment Act, a guarantee may be binding notwithstanding the consideration does not appear on the face of it, yet the consideration must still be proved, and that the effect of that section is, not to render the party liable without proof of consideration, but only not to exempt him from liability because that consideration does not appear on the face of the instrument. Then assuming that this document was signed subsequently to the passing of the Mercantile Law Amendment Act, it was contended that it did not of itself constitute an entire agreement or shew any liability on the part of the plaintiff, but that such liability must be established, in part by the use of the document, and in part by parol evidence of consideration. The Court took time to consider whether that prevented the necessity of having the document stamped, and we are of opinion that the objection ought not to prevail. The ground of our decision is based on the authority of *Rams-*

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bottom v. Mortley (a). There a paper was tendered in evidence, and it was objected that it required a stamp. *Thomson*, C. B., ruled that it ought to be stamped, and thereupon directed a nonsuit. *Best*, Serjt., applied to set aside the nonsuit on the ground that the paper was neither a contract nor evidence of a contract, inasmuch as the name of one of the contracting parties, the lessor, was wanting to it; in other words, that there was an objection to the contract as a valid contract under the Statute of Frauds, and that therefore it did not require a stamp. Lord *Ellenborough* replied:—"It may not be evidence of the whole contract, but it is evidence of a material part. If a necessary part in the proof of the contract, I think that it ought to be stamped." *Dampier*, J., said:—"This may not be such a memorandum of the contract as would satisfy the Statute of Frauds, but it is such a memorandum of the agreement as requires a stamp." I am therefore of opinion, and the other judges concur, that this case is within the 55 Geo. 3, c. 184, Sched. part 1, "Agreement"; and that the document required a stamp, although it may be that by itself it is not a guarantee within the meaning of the 4th section of the Statute of Frauds. There will therefore be no rule.

Rule refused.

(a) 2 M. & Sel. 446.

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THE first count of the declaration stated that the defendants, at the time of the occurrences hereinafter mentioned, were common carriers of goods for hire from London to Plymouth, and the plaintiff, heretofore, to wit, on, &c., delivered to the defendants as such common carriers at London aforesaid, and they received of him as such, a parcel containing goods of the plaintiff, to be carried by them from London to Plymouth, to be there delivered by the defendants for the plaintiff, for hire and reward; yet the defendants, although a reasonable time for that purpose has elapsed, have not carried the said parcel to the place aforesaid, and there delivered the said parcel for the plaintiff, and in fact by their carelessness and negligence, while the said parcel was in their possession for the purpose aforesaid, the said parcel of goods, being of great value, became and was lost to the plaintiff.—There was also a count in trover.

Where goods are tendered by a carrier to the consignee who refuses to pay the carriage, whereupon the carrier refuses to deliver the goods, it is the duty of the carrier to retain the goods at their place of destination, at least for a reasonable time, and during that time to await any directions from, if not to communicate with the consignee: So held Per Pollock, C. B., Martin, B., and Channell, B.; Bramwell, B., dissentiente.

The plaintiff delivered in London, to the

defendants, a railway Company, a parcel directed to the plaintiff's agent at Plymouth. The defendants' railway terminates at Bristol from whence they forwarded the parcel to Plymouth by the South Devon Railway. The parcel was tendered by a servant of that Company to the consignee at Plymouth who refused to pay the amount demanded for carriage, whereupon the servant took the parcel away. The next day the consignee went to the office of the South Devon Railway and demanded the parcel and tendered the amount of carriage, when he was told that the parcel had been returned to London, but though he made repeated applications at the office in London, the parcel never was delivered. The jury having found that the tender was made within a reasonable time and that the parcel was sent back to London before a reasonable time had elapsed.—Held: Per Pollock, C. B., Martin, B., and Channell, B., that the defendants were responsible for the act of the South Devon Company, and that the sending the parcel to London at the time they did, followed by the nondelivery of it to the plaintiff, upon or subsequent to the several applications, afforded sufficient evidence of a breach of duty by the defendants in not taking care of the parcel for the plaintiff, even supposing their duty *qua* carriers ended with the tender of the goods. Bramwell, B., dissentiente.

Per Bramwell, B., that assuming the act of the South Devon Railway Company was the defendants' act, the defendants were not responsible, inasmuch as they had performed their duty by carrying and tendering the parcel, and that upon the refusal of the consignee to receive it, the defendants had a right to send it back to London.—Also that the defendants were not responsible for the act of the South Devon Railway Company.

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Pleas.—First, to the first count: That the plaintiff did not deliver, nor did the defendants receive, a parcel to be carried as aforesaid.

Secondly, to same count: That defendants deny the truth of the breach therein alleged.

Thirdly, to same count: That after the delivery to and receipt by the defendants of the said parcel and its contents, they duly carried and caused to be carried the same from London to Plymouth, according to their duty in that behalf, and they there were always ready and willing to deliver the same for the plaintiff, and tendered and offered and caused to be tendered and offered, the same for delivery for the plaintiff upon payment to them of certain reasonable hire and reward due and payable to them, to wit, by the plaintiff for and in respect of the carriage of the said parcel and its contents as aforesaid, of all which the plaintiff had notice; but the plaintiff at all times wholly refused to pay or tender the amount of the said hire and reward, or any sum of money whatever in respect thereof, nor was any sum ever paid or tendered in respect thereof to the defendants, wherefore the defendants refused to deliver, and did not deliver the said parcel and its contents for the plaintiff, which is the breach complained of.

Fourthly, to last count: Not guilty.

Fifthly, to same count: That the goods were not the goods of the plaintiff.

The plaintiff joined issue on the first, second, fourth and fifth pleas.

Replications to the third plea.—First: the plaintiff takes issue upon the third plea. Secondly: that after the said tender and offer by the defendants to deliver the said parcel, and within a reasonable time then next following, the plaintiff at Plymouth aforesaid was ready and willing to receive the said parcel, and offered to pay to the defendants

the said hire and reward, and then requested the defendants to deliver to him the said parcel according to their duty in that behalf, but the defendants refused then or at any other time to deliver the same at Plymouth aforesaid, and have from thence hitherto continually refused, neglected and omitted so to do, and discharged the plaintiff from tendering such hire and reward to the defendants, and by means of the premises the said parcel has become and is wholly lost to the plaintiff, as in the declaration mentioned.—Issue thereon.

At the trial before *Pollock*, C. B. at the London sittings after last Hilary term, the following facts appeared.—The plaintiff, who was a carrier in London, made up a packed parcel directed to an agent of the plaintiff at Plymouth named Reynolds. The parcel was delivered at a receiving office of the defendants, to be carried to Plymouth. The defendants' railway terminates at Bristol, from whence they forwarded the parcel to Exeter by the Bristol and Exeter Railway, and from Exeter to Plymouth by the South Devon Railway. The parcel arrived at its destination, and was taken to the office of Reynolds by a servant of the South Devon Railway Company, and 2s. 8d. was demanded for its carriage, the usual charge for such a parcel being 1s. 6d. The servant of Reynolds refused to pay the sum demanded, but offered the usual charge, which the servant of the South Devon Railway Company would not accept, and took away the parcel. On the next day Reynolds's clerk went to the office of the South Devon Railway at Plymouth, and tendered the amount demanded for the carriage, when he was informed that the parcel had been returned to London. Repeated applications were made at the defendants' office in London, but the parcel could not be found.

It was submitted on the part of the defendants that,

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under these circumstances, they were not liable. The learned Judge was of opinion that the defendants ought not to have sent back the parcel to London so soon, and he left it to the jury to say whether the demand and tender were made within a reasonable time after the plaintiff had refused to receive the parcel, and whether the parcel had been sent back before the expiration of a reasonable time. The jury found both questions in the affirmative, and a verdict was entered for the plaintiff, leave being reserved to the defendants to move to enter the verdict for them.

Bovill, in the following term, obtained a rule nisi to enter the verdict accordingly, or for a new trial, on the grounds that the defendants having carried the parcel and tendered it at Plymouth to the consignee in due course, and he having refused to pay the amount of the carriage, the defendants were not liable: and that there was no duty or obligation on the defendants or the South Devon Railway Company, to keep the parcel at Plymouth after the consignee had refused to pay the carriage; and that if the act of sending the parcel to London was wrongful, it was the act of the South Devon Railway Company, and the defendants are not liable for that act: that the verdict was against the evidence on the question left to the jury as to the reasonableness of sending back the parcel to London.

J. Brown shewed cause in last Easter term (May 5, 6).—The defendants were not justified in sending back the parcel to London, but were bound to keep it at Plymouth a reasonable time. [*Pollock*, C. B.—Suppose a quantity of fish was sent by railway from Plymouth to London and the consignee refused to pay the amount demanded for the carriage, would the Company be justified in sending it back to Plymouth? *Martin*, B.—Or suppose a parcel came to a person who had not money enough to pay for the

carriage. *Bramwell*, B.—Here there was a peremptory and final refusal.] The consignee should have been allowed an opportunity of tendering, within a reasonable time the amount demanded. The defendants had no right to send back the parcel to London, and inflict on the plaintiff the penalty of double carriage, for what might be a mere mistake of his agent in calculating the charge. The plaintiff cannot be in a worse situation than if he had wrongfully placed the parcel on the Company's station at Plymouth, in which case they would not have been justified in removing it to a distance: *Forsdick v. Collins* (a). In Story on Bailments, § 117, it is said with reference to the place where the restitution of a deposit is to be made "If a particular place is agreed on between the parties, that, of course, is to regulate the matter. If no place is agreed on, the property ought to be restored at the place where it is found, or where it ought to be kept. *Depositum eo loco restitui debet, in quo sine dolo ejus est apud quem depositum est; ubi vero depositum est, nihil interest* (b). * * * Much must depend upon the particular circumstances of the case, and the presumed intention of the parties. It cannot, for instance, be presumed that a depositor could intend that if the depositary removed to another country, he should carry the deposit with him." Here the Company should have deposited the parcel in some convenient place, near to the place where it was when the plaintiff's agent refused to receive it. The carrying it back to London was a conversion. In *Forsdick v. Collins* (a), Lord *Ellenborough* held that the removal of a block of stone, belonging to the plaintiff, from the defendant's land, not to an adjacent place, but to a distance, was a conversion. In trespass for taking goods, if the defendant justifies the removal of them, he must plead that he removed them to a small and convenient

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(a) 1 Stark. Rep. 173.

(b) Dig. Lib. 16, tit. 3, l. 12, s. 1.

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distance. [*Bramwell*, B.—Suppose a consignee says that he will not take in a parcel, has the carrier any duty towards the sender? Is he bound to bring back the parcel, or to give notice to the sender? *Pollock*, C. B.—In tendering the parcel to the consignee, the carrier has done what he contracted to do, he may probably not know where the parcel comes from.] At least he is bound to give up the parcel if it is demanded by the sender, and the money due for the carriage is tendered. [*Bramwell*, B.—Suppose this was a parcel containing perishable goods, such as fish.] There may be a distinction as to such goods. In *Bacon's Abridgment*, Tender, H. 2, it is said “if a tender at the day, of corn or of any other goods of a perishable nature, be pleaded with a refusal, there is no need to plead *uncore prist*; for as such goods may have perished, and if they have not as it might have been an expense to keep them, it would be hard to compel a party to be ready at all times after the tender and refusal to deliver them, (citing *Peytoe's Case* (a)). The doctrine of that case seems to apply to all kinds of goods that are bulky; for there must always be an expense in finding a warehouse for such goods.” Here the goods were demanded both at Plymouth and in London. It was enough if the plaintiff was ready to pay; it was not necessary to tender the money, because payment was to be concurrent with delivery. The South Devon Railway Company were the agents of the defendants and their act in sending the parcel to London was the act of the defendants.

Bovill and *Unthank*, in support of the rule.—After the consignee had refused to receive the goods, no one had a right to call on the defendants to keep them. If goods are lying at the warehouse of a railway and the owner refused to take them away, they may be distrained damage

(a) 9 Rep. 79; Co. Litt. 207, a.

feasant. The risk of carriers is great, and the plaintiff had no right, by refusing to pay, to impose on the defendants the additional duty of keeping the goods at Plymouth. No duty can arise out of that which was a wrongful act on the part of the plaintiff. In Story on Bailments, § 538, it is said, that "As soon as the goods have arrived at their proper place of destination, and are deposited there, and no further duty remains to be done by the carrier, his responsibility as such ceases." In section 541, it is laid down, that if the parties waive the custom to deliver to the owner at the place of destination the carrier is discharged (*a*). The finding is insensible, unless it can be shewn that there is some rule of law which binds the carrier to keep the goods after the refusal of the consignee to receive them. Under such circumstances, a carrier is certainly not bound to send the goods back to the consignor: he has a right to take them to any convenient place of deposit he thinks fit, and leave them there. Here the Great Western Railway Company did not themselves carry the parcel beyond Bristol. Suppose it had been directed to a person living a few miles from that station, and sent to his house by a common carrier's cart; if payment of the carriage was refused, it must have been brought back by the carrier to the station at Bristol. That is exactly what was done here by the South Devon Railway Company. That Company would of course take the parcel back in order to get the sum due for carriage from the Great Western Railway Company, and that the latter Company might be enabled to get the sum due to them from the person with whom they contracted. A carrier is presumed to make the contract with the person who delivers goods to be carried. [*Pollock*, C. B.—The carrier is certainly not bound to send the goods back again.] The Company were not bound to warehouse the parcel at Plymouth. They might have

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(*a*) *Strong v. Natally*, 4 Bos. & P. 16.

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taken it to any place where they had a warehouse. [*Martin*, B.—Suppose the parcel had been directed to a poor person at Plymouth, who had not the money to pay for it when it was tendered to him, would it have been reasonable to send it back to London at once?] The plaintiff should have demanded the parcel at the place where it was. A refusal to deliver at Plymouth or at the booking office where it was not, was no conversion. If the act of sending the parcel back to London was a wrongful act, that was not the act of the defendant, but of the South Devon Railway Company.

Cur. adv. vult.

The Court having differed in opinion the following judgments were now delivered.

CHANNELL, B.—The declaration in this case contains two counts. The first alleges that the defendants were common carriers of goods for hire from London to Plymouth, that the plaintiff delivered, and the defendants received a parcel of goods to be carried from the former place to the latter, and that the defendants had not carried to Plymouth and there delivered the said parcel, and that it was lost. The second count was in trover for goods. The pleas to the first count were. First: That the plaintiff did not deliver nor did defendants receive the said parcel as alleged. Secondly: A denial of the truth of the breach. Thirdly: That after the delivery of the parcel the defendants duly carried it to Plymouth, and tendered and offered it to the plaintiff upon payment of the reasonable hire and reward; but the plaintiff refused to pay, whereupon the defendants refused to and did not deliver the parcel. To the count in trover the pleas were, first, Not guilty; and secondly, that the goods were not the goods of the plaintiff. The plaintiff

joined issue upon all the pleas, and for a second replication to the third plea to the first count, replied that after the tender and offer by the defendants to deliver the parcel and within a reasonable time then next following, the plaintiff, at Plymouth, was ready and willing to receive the parcel and offered to pay the defendants the said hire and reward, and requested the defendants to deliver to him the parcel; but the defendants refused to deliver it, and continually afterwards refused and omitted to deliver it, and discharged the plaintiff from tendering the hire and reward, and the parcel has become and is lost.

At the trial before the Lord Chief Baron at the sittings after last Hilary Term, the following appeared to be the facts of the case.—The plaintiff was a collector of parcels in London for transmission to the country, and caused to be delivered to the defendants at a booking office in London, where the defendants had an agency, a parcel of goods to be carried to Plymouth. The ordinary rate for the parcel was 1*s.* 6*d.*, but after its delivery to the defendants it was discovered that the parcel was what is called a packed parcel, and 50 per cent. additional, viz. 9*d.*, was added, making the charge 2*s.* 3*d.*; and for the purpose of this case, it is to be taken that 2*s.* 3*d.* was the lawful charge. The parcel arrived at Plymouth on the 28th, and was tendered to a clerk of the consignee, who objected to the amount of the charge, and refused to pay it. The clerk at Plymouth refused to deliver the parcel without payment, and said he would send it back to London. On the following day, the clerk of the consignee, was sent by the consignor for the parcel with directions to pay the sum demanded under protest and obtain the parcel, but the parcel had that morning been sent back to London. The plaintiff made inquiry at the booking office in London where the parcel had been originally delivered and also of a

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clerk at the defendants' office at Paddington, but the parcel was never delivered to the plaintiff nor could any account of it be obtained, and the plaintiff was compelled to pay to the owners of the contents their value. The jury, in answer to questions left to them by the Lord Chief Baron, found that the tender of the amount of the carriage and the demand of the parcel were made by the consignee on the 29th and within a reasonable time after the offer by the defendants on the 28th to deliver the parcel: that the parcel was sent back to London before a reasonable time had elapsed, and also that the parcel ought not to have been sent back to London. A verdict was thereupon entered for the plaintiff for the value of the parcel, but leave was given to the defendants to move to enter a verdict for them. A rule to that effect was granted, and which has been argued. I regret that we are not all agreed in opinion as to the proper judgment to be given in this case. That which I am about to deliver is to be considered as the judgment of my brother *Martin* and myself, and we are of opinion that the rule which was obtained by the defendants to set aside the verdict for the plaintiff and enter it for the defendants, or for a new trial, ought to be discharged.

With respect to the first count of the declaration, it was contended on the part of the defendants that by the tender on the 28th to the clerk of the consignee, and the refusal of the latter to accept the parcel and pay for the carriage, the duty of the defendants as carriers was at an end, and that they were entitled to have the verdict on the second issue entered for them, and that being so entitled, the issues arising out of the third plea were, except as regards costs, immaterial. We do not at all doubt that the tender of the parcel properly pleaded, and not avoided by a subsequent demand, would afford a valid defence in an action against the defendants founded on their duty as carriers; but the question is as

to their right to the verdict on the second issue. It was open to the defendants either to deliver the parcel and afterwards sue for the carriage, or to detain the parcel in respect of their lien for the carriage. They must be taken to have elected to retain the parcel for their lien, and to have done so as carriers. We think the issue on the second plea raises the question of the delivery of the parcel, in other words, the *performance* by the defendants of their contract, but the tender seems to us to amount only to an excuse for non-delivery. We are therefore of opinion that the defendants are not entitled to a verdict on the second issue, and that all the issues on the first count, except that upon the first replication to the defendants' third plea, have been properly found for the plaintiff. Even supposing this not to be so, and that in strictness the duty of the defendants, as carriers, ended with the tender of the parcel on the 28th, and the refusal of the consignee then to accept it and pay for the carriage, it cannot we think be doubted that the defendants had another duty to perform, and that is, it was their duty to take care of the goods for the consignor, who in this case was the plaintiff; and that this duty on the part of the defendants was one springing out of their original employment as carriers: (See Story on the Law of Bailments, chap. vi., p. 347, sec. 545. See also the cases collected in the Notes to Smith's Leading Cases, vol. i., p. 182, 4th ed.) This duty, we think, called upon the defendants to retain the parcel at Plymouth, its place of destination, at least for a reasonable time, and during that time to await any directions from, if not to communicate with, the consignor. The defendants did not do so, and it seems to us that sending the parcel to London at the time they did, followed by the non-delivery of the parcel to the plaintiff upon or subsequently to the several applications made for it, affords

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sufficient evidence of a breach of duty by the defendants in not taking care of the parcel for the plaintiff, even supposing their duty *qua* carriers ended with the tender of the goods on the 28th.

But it was further objected that trover was not the proper remedy, and upon this point, if it be necessary to resort to the count in trover, the case is not free from difficulty. The parcel no doubt was, as against the defendants, the property of the plaintiff. What passed at Plymouth on the 29th, when the defendants refused to deliver up the parcel on the ground that it had been sent to London, would dispense, we think, with a formal tender of the sum due for carriage. But it is said the demand then made of the parcel and the refusal to deliver it, the goods not being there, would not amount to a conversion. Still all the facts, coupled with the finding of the jury, may be looked to, and we think the sending the parcel to London, instead of keeping it at Plymouth for a reasonable time, and the non-delivery to the plaintiff upon or after the application mentioned, warranted the jury in finding, as they have done, a conversion by the defendants of the plaintiff's goods. The objection made at the trial was that the defendants were not liable at all. We entertain no doubt that, upon the facts proved, and a declaration properly framed as for a negligent loss, the defendants would be liable, and had the objection as to the inapplicability of the count in trover been distinctly taken at the trial, the pleadings might and probably would have been amended.

Another objection was made, not upon anything which appeared in evidence at the trial, but upon what we know to be the fact. The defendants are owners of the railway from London to Bristol only, and another Railway Company, viz. The South Devon, are the owners of the railway which terminates at Plymouth; and it was argued that the

defendants were not responsible for the conduct of the clerk of the South Devon Company in sending back the parcel. There was no evidence given of this at the trial; but in reality the truth is so; and if it affected our judgment upon the question in controversy, we would endeavour to give defendants the benefit of it by a new trial. But we think that the defendants are responsible for the act of the clerk at Plymouth. We adhere to the judgments of this Court in *Muschamp v. The Lancaster and Preston Railway Company* (a), and *Scothorn v. The South Staffordshire Railway Company* (b).

In our opinion if a carrier contracts to convey to and deliver goods at a particular place, his duty at that place is precisely the same whether his own conveyance goes the entire way, or stops short at an intermediate place and the goods are conveyed on by another carrier; and that this carrier, or his clerk or agent at the place of destination, is the agent of the original carrier for all purposes connected with the conveyance and delivery and dealing with the goods, to the same extent as his own clerk would have been at the place where his own conveyance stops with regard to goods to be there delivered; or, in this particular case, that the clerk of the South Devon Company was, in respect of the parcel in question, the agent of the defendants, to the same extent as their own clerk at Bristol would have been had the parcel been deliverable there. Any other view of the law would, in our opinion, lead to great uncertainty and confusion in common and ordinary matters of business of very frequent, not to say of every day occurrence. It was suggested that the judgment of the Court of Exchequer Chamber in *Collins v. The Bristol and Exeter Railway Company* (c) was at variance with the cases

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(a) 8 M. & W. 421.

(b) 8 Exch. 341.

(c) 1 H. & N. 517.

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before mentioned. We have referred to it and do not think it is, and we consider them to have been rightly decided. Upon the whole we are of opinion that the rule obtained by the defendants ought to be discharged, except as to the issue joined on the first replication to the third plea.

I have stated that the judgment just delivered is to be considered as that of my Brother *Martin* and myself; but I am authorized to add that the Lord Chief Baron concurs in the result at which we have arrived.

BRAMWELL, B.—The facts of this case are as follows:—The plaintiff, living in London, sent from London a parcel by the defendants directed to “Reynolds, Plymouth.” The parcel was duly taken and tendered at the house of Reynolds to a person there and a sum demanded for its carriage, which sum, it is agreed for the purposes of this case, was properly charged. Payment of this sum was refused, on which the railway porter retained the parcel, saying it would be returned to London. This was about two o’clock in the day. Next morning, at eight, the parcel was returned to London. The person to whom the parcel was directed was an agent of the plaintiff. The defendants’ line extends to Bristol; the rest of the distance to Plymouth is made up by two railways; one only, the South Devon, was mentioned on the argument, which has its terminus at Plymouth, by whose servant the parcel was tendered, and afterwards returned to London to the defendants.

I am of opinion that the defendants are entitled to judgment. They undertook to deliver or tender the parcel at “Reynolds, Plymouth.” They did so, and having a lien for its carriage, they were entitled to retain it on refusal to pay that carriage; and it is impossible to say that as carriers they were bound to do anything more; in other words, they had carried and tendered to deliver, and had no other further

duty of carrying or delivering to perform. Then, had they any other duty, or have they done any wrong independent of their contract to carry? Now they might, if they pleased, have delivered the parcel without payment of the carriage, and their only right to retain it was to secure that carriage, and that right, no doubt, they must be bound to exercise with due regard to the interests of the sender of the parcel or owner of the property. It is said they had no right to send the parcel back to London, or at all events not till a reasonable time had elapsed; and the jury have found, as facts, that the parcel *ought* not to have been sent back to London, and that a reasonable time for so doing had not elapsed when it was done. As to the first part of this finding, I do not attempt to guess what the jury really meant, but the only thing they could legally mean is, that the facts were such that in reference to some rule of law the parcel ought not to have been sent back. But I know no such rule. I am at a loss to see why the parcel might not be sent back to London whence it came. It is to be borne in mind that the refusal to pay its carriage and take it was peremptory and final; no time for consideration was requested. Then why were not the defendants to keep the parcel in London? Suppose a carrier by common road from A. to B. passes through X. Y. and Z., if a parcel is refused at X. must he leave it in charge of some one there or take it on to B. and leave it, or take it back to A.; or suppose he makes a round beginning and ending at A. I not only think the defendants had a right to bring the parcel back to London, but I think it was rather their duty to do so; for upon refusal of the carriage they were entitled to sue the sender for it; and had they demanded it of him, and he paid them, he would have been entitled to the parcel, but as he resided in London, and sent the parcel from London, it was right, or at least not wrong, that the parcel should be there.

A great deal was said about returning a basket of fish

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sent from the sea side to London. But if the London consignee will not take it, I see no advantage in its spoiling there rather than at the port it started from. But surely the difficulty may be retorted. If any one sent fish, game, or fruit which was refused, and which would have a chance of being good if returned to the sender, he might well complain if it was not; and I ask those who deny the right to send a refused parcel back to where it came from, or to a warehouse convenient to the carrier, to lay down some rule as to what ought to be done with it. Is the carrier bound to keep it at its place of destination? If so, why? If not, where is he bound to keep it in preference to where it came from.

But it was urged that the jury had found that the parcel was sent back before a reasonable time had elapsed. But reasonable for or with reference to what? As I have observed, the refusal to pay the carriage and take the parcel was absolute. It must mean therefore that Reynolds had not had a reasonable time to change his mind. That the defendants had not given him a reasonable time to do what he had said he would not do. It seems to me then that these findings by the jury are unmeaning, and that the defendants had a right to return the parcel to London, and hold it there to secure their lien, on the peremptory and absolute refusal by Reynolds to pay for its carriage. I do not at all dissent from the doctrine in 1 Smith Lead. Cas. 182, "when goods have arrived at the end of the transit the carrier is bound to keep them a reasonable time for the owner." But that means where it is no part of their duty to deliver. That appears from the judgment of *Buller, J.*, in the case cited. It is clear there was no such duty in the defendants here, as they might have delivered the parcel to Reynolds at once.

I do not like to multiply distinctions, but the case is made stronger by the fact that the last part of the carrying

was performed by the South Devon Company. I know, of course, that the defendants are responsible for them in the sense that the defendants undertook the whole carriage, but the South Devon Company had clearly a right to return the parcel to the defendants and demand their charges, and of course to return the parcel and debit the defendants in account; and the defendants could have no station or place at Plymouth, as that would be ultra vires. The return therefore must be to the defendants, and I suppose it will not be said that the parcel might have been kept and warehoused by them at Bristol, but not at London. Moreover, if returning the parcel to London was a tortious dealing with the plaintiff's property, it was the act not of the defendants, but of the South Devon Company, and it is in vain to say it was adopted by the defendants, for nothing was shewn, except that when the parcel was delivered to them by the South Devon Company, they, the defendants, took it. I desire not to be understood as dissenting from *Muschamp v. The Lancaster Railway Company* (a): I entirely agree with it. As to the case of *Scothorn v. The South Staffordshire Railway Company* (b), I reserve to myself the right to question its correctness on a fitting occasion. It does not however militate with the opinion now expressed, viz., that a tortious conversion by the South Devon Company was not a conversion by the defendants.

I have hitherto considered the question independently of the pleadings, but the case must be decided by them. The first count states that the defendants were common carriers, that the plaintiff gave them goods to carry and deliver: and the breach of duty is that the defendants did not carry and deliver. I think the first and second pleas cannot be found for the plaintiff, the second plea being a plea of performance. The third plea, however, sets forth the tender of the parcel

(a) 8 M. & W. 421.

(b) 8 Exch. 341.

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and the refusal of payment of the carriage, by way of confession and avoidance. The replication to that is a clear departure, for it sets up a different breach, viz., a refusal to deliver the parcel on a tender of the carriage, to secure which the defendants were keepers of the parcel after the first offer to deliver the parcel by the defendants. But I think also it is not proved, for the allegation that the plaintiff tendered the carriage within a reasonable time, and that the defendants refused to deliver the parcel is only sensible on the supposition that it means that the tender was made while the parcel was still there, which is not true. Moreover, it is not true that the parcel was thereby lost.

As to the count for a conversion. I think there was no tortious dealing with the parcel; that if there was, and the defendants are responsible for it, it was not a conversion. On the last point I must confess my inability to lay down any rule—as to what that unfortunate expression does or does not extend to. But it seems absurd to say that a person having a lien on a chattel converts it to his own use by keeping it in one place rather than in another, or by sending it away from a place sooner than he ought, when he never at any time claims any other or greater right than what he supposes is derived from his lien: (See *Heald v. Carey* (a) per *Maule, J.*) It really cannot be pretended there was any refusal by the defendants to deliver the parcel to the plaintiff, except at Plymouth; and as it was not there, that was no conversion. There was no other demand, no other refusal, and no tender of the sum due to the defendants.

For these reasons I am of opinion that the defendants are entitled to judgment.

Rule absolute to enter the verdict for the defendant on the issue joined on the first replication to the third plea, and rule discharged as to the residue.

(a) 11 C. B. 977, 993.

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IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

LLEWELLYN and Others v. THE COMPANY OF PROPRIETORS OF THE SWANSEA CANAL NAVIGATION. June 20.

ERROR on the judgment of the Court of Exchequer for the defendants (a). The case was argued (b) (June 19) by

By a Canal Act, the defendants were bound to make a weir at a particular part of the canal for the purpose of discharging all superfluous water into a reservoir for the benefit of premises occupied by the plaintiffs.

Shipson, for the plaintiffs.—No question arises as to what is waste water; but the only question is, what is the proper construction of the indenture of the 1st July, 1845. By that indenture, the Company are to be at liberty to take the water above the seventh lock “for the purpose of maintaining the navigation of the canal below the seventh

The defendants in compliance with the requirements of the Act, erected the weir above the seventh lock. In 1844 more water was required for the navigation below the seventh lock than passed through the seventh lock when the sluices were opened for the passage of boats through the lock. The defendants to supply the deficiency let water down from above the seventh lock, to maintain the water at such level as was required for the navigation below it. The plaintiffs then filed a bill in equity to restrain them from so letting down the water. The suit was compromised by an indenture which provided “that the defendants might take and use, whenever they should think it necessary or expedient for maintaining the navigation of the canal below the seventh lock, so much of the water of the canal as they should consider necessary or expedient for that purpose, subject to a weekly rent of 10*l.* for each and any week or part of a week in which the water above the seventh lock should be taken or used by the defendants for the purposes above mentioned.”—On two occasions boats, having passed through the seventh lock sunk; in order to raise them the defendants emptied the lock and the part of the canal immediately below the seventh lock and then having emptied the boats, refilled the canal between the sixth and seventh locks by opening the sluices and letting in water from above. On another occasion, the water having been let out of the canal between the seventh and sixth locks, for the purpose of enabling the defendants to get at the sixth lock to repair it, the defendants afterwards refilled that part of the canal by letting water down from above the seventh lock.

Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the using the water to refill the canal on the occasion of the boats having sunk was not taking or using the water “for the purpose of maintaining the navigation of the canal below the seventh lock.”

Held, also (reversing the judgment of the Court of Exchequer), that the using the water to refill the canal on the occasion of the repairs was a taking or using the water “for the purpose of maintaining the navigation of the canal below the seventh lock.”

- (a) See the case, 1 H. & N. 343. *ridge, J., Cresswell, J., Williams,*
 (b) Before *Cockburn, C.J., Cole- J., Crompton, J., and Willes, J.*

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lock," subject to a weekly rent of 10*l*. Then, what is the meaning of the words "maintaining the navigation of the canal"? First, the refilling the canal between the seventh and sixth locks, after the water had been let out for the purpose of repairing the sixth lock, was a "maintaining the navigation of the canal" within the meaning of the indenture. The Company let out the water for their own purposes, and it was as necessary that the canal should be refilled, in order to navigate it; as if the deficiency of water had arisen from natural causes. Suppose the banks had given way between the seventh and sixth locks, by which the water flowed out, would not the refilling the canal be maintaining the navigation? The provision that the Company may once a year let out the water from the canal, for the purpose of cleansing it without being liable to pay rent, so that the time occupied in refilling does not exceed seventy-two successive hours, shews that the intention was that they should pay on other occasions. The indenture was framed on the ground of the claim in the plaintiffs' bill, which prayed that the defendants might be restrained from opening the sluices of the seventh lock, except for the passage of boats, but the majority of the Court below thought that the prayer of the bill must be read in connection with the facts stated, and that such a claim was unreasonable. Secondly, the refilling the part of the canal between the seventh and sixth locks, after the water was taken out for the purpose of raising the sunken boats, was also a "maintaining the navigation." If the boats had not been raised, the navigation of the river would have been impeded. The intention of the parties was, that whenever the mill-owners were deprived of the water, the rent should be paid. [*Williams, J.*—Suppose the water was lost through the negligence of the defendants servants in leaving open the sluices?] In that case the

defendants would be liable to an action, but not to the rent. The meaning of the indenture is, that the defendants shall not take the water at all otherwise than for the ordinary purposes of navigation, except on payment of the rent.

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Lush, for the defendants.—The plaintiffs put a strained construction on the deed. At the time it was made, the parties never contemplated that the defendants should be liable to pay rent under circumstances like these. The contest was whether the defendants should be allowed to bring boats up the canal before boats came down, and that was the whole matter for which the parties intended to provide. There was no dispute about the right of the Company to take the water, in order to refill a part of the canal when emptied for the purpose of repairs. [*Cresswell*, J.—After the clause empowering the Company to take as much water as necessary, on payment of the rent, comes the proviso that they may once a year let out the water for the purpose of cleansing the canal, without payment of rent, if the time occupied in refilling it does not exceed seventy-two successive hours; therefore, by implication, if they exceed that period the Company must pay, even though they take the water for repairs: that shews that those occasions would have been within the clause except for the proviso.] The Act enables the Company to repair, making compensation to the mill-owners for damage thereby done; and it can scarcely be supposed that the Company would have bound themselves to pay rent, when they might do the repairs without any damage to the mill-owners, as, for instance, in the night time. [*Coleridge*, J.—It is difficult to understand how a general right to repair can be presumed when there is this proviso.] The letting in the water after it has been emptied for the purpose of repairs is not a “maintaining the navigation”;

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in its ordinary sense, and a constructive liability cannot be imposed by reason of the proviso. At all events, the proviso does not apply to the two occasions on which the boats were sunk. The boats had passed into the seventh lock, and the waste of water was occasioned by the actual passage of the boats through that lock, for, in order to effect that, it was necessary to empty and refill that part of the canal.

Phipson replied.

Cur. adv. vult.

COCKBURN, C. J., now said.—In this case we are of opinion that the judgment of the Court of Exchequer must be reversed so far as relates to the 10*l*. claimed with reference to the repairs of the sixth lock, and upheld so far as relates to the two sums of 10*l*. claimed in respect of the water for refilling of seventh lock, after the boat which had sunk in it was raised. The question arises upon the construction of an indenture made between the plaintiffs and the proprietors of the Swansea Canal Navigation, with reference to the water in the river Tawe. The canal had been constructed under the authority of an act of parliament, which required a weir to be made above the seventh lock, for the benefit of the plaintiffs, who were mill-owners on the adjoining stream. Disputes having arisen, in the year 1844, as to the right of the proprietors of the navigation to take the water for the purpose of maintaining the navigation below the seventh lock, whereby the plaintiffs were deprived of the benefit of the water which would otherwise have been forced by the weir into the stream which they claimed; an agreement was entered into between the parties by an indenture of the 1st July, 1845, whereby it was agreed that the Company should be at liberty, by opening the sluices of the seventh lock, at other times than when boats, barges and other vessels navigating the canal

should be passing, or about to pass through, the seventh lock, to take and use the water "*for the purpose of maintaining the navigation of the canal below the seventh lock*;" upon payment of a weekly rent of 10*l.* for each and every week, or every part of a week in which the water in the canal, above the seventh lock should be taken for the purposes and in the manner thereinbefore mentioned: with a provision, however, that it "should be lawful for the said Company of proprietors, once in every year to let out the water from the said canal, for the purpose of emptying, cleaning and repairing the whole or any part thereof; and also to refill and make navigable the said canal" for the time of seventy-two successive hours without the payment of this rent. Upon three several occasions the Company took the water, which gave rise to the questions before us. Twice they took the water for the purpose of refilling the seventh lock, having previously emptied it in order to raise a boat which had sunk in its passage through the lock. Upon the third occasion they emptied and refilled the pond of the canal between the sixth and seventh lock in order to repair the sixth lock. It appears to us, that the two occasions when the water was emptied from the seventh lock for the purpose of raising the boats sunk in it, and the lock refilled in order to float the boats out of it, do not come within the terms of this indenture as to taking the water "at other times than when boats, barges or other vessels navigating the said canal shall be passing or about to pass through the said lock." We think that although the water was in the first instance emptied out of the lock in order to raise the boats; when the water was again passed into the lock (which is the matter upon which the plaintiff's claim arises), it was not "at other times than when a vessel was passing or about to pass through the lock," it being done for the purpose of floating the boats out of the lock, and it was what the Company had a right to do

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without bringing themselves within the liability of paying the rent of 10*l*. But as regards the third claim, which is in respect of emptying the water out of the seventh lock in order to refill the sixth lock, the sixth lock having been previously emptied for the purpose of repairs, we think that this must be considered as done for the maintenance of the navigation, and it therefore does come within the provision of the indenture, and consequently the Company are bound to pay the rent of 10*l*. Upon these grounds we think the judgment of the Court of Exchequer is to be upheld with reference to that rent of 10*l*., but not as to the others.

COLERIDGE, J.—I am of the same opinion. It seems to me that two things must concur to bring this case within the clause entitling the mill-owners to the payment of the rent; one is the purpose for which the water is withdrawn, viz., for maintaining the navigation of the canal; the other has reference to the time at which it is done, that is, at other times than when boats, barges, or vessels navigating the canal are passing or about to pass through the lock. That being so, it is clear, on applying it to these three cases, that two are of the same description, and the other is a different one. First, with regard to the sunken boats: it may well have been contended that the water was taken for the purpose of maintaining the navigation, but it was not taken at other times than when a boat was passing or about to pass through the lock, because the boat was in the lock and it was filled for the purpose of passing the boat through the lock; therefore in that respect the two requisites do not concur. But with regard to the other occasion, namely, the repairs, it seems to me that the water was taken both at other times than when boats or barges navigating the canal were passing through the lock; and it was not, properly speaking, “for the purpose of

maintaining the navigation of the canal below the seventh lock."

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WILLIAMS, J.—I am of the same opinion. I will only add a word as to one of the grounds on which this Court has come to the conclusion that the decision of the Court of Exchequer is erroneous. The question turns upon the words in the indenture, "for the purpose of maintaining the navigation of the said canal below the seventh lock." Now, inasmuch as the water was to be withdrawn mainly for the purpose of making the canal below the seventh lock in a navigable condition, it is obvious that the words employed are capable of including one of the cases under consideration. And the question is whether, being capable of being applied to that case, it ought not to be so applied. Possibly the parties may have intended that the words should not be applied to any case where there was any question as to the right of the Company to take the water, but I think all doubt on that subject is removed by considering the terms of the proviso, by which, as it seems to me, they are liable to pay upon the occasion of the annual letting out of water for the purpose of repairing the canal, when the refilling exceeds the period of seventy-two successive hours. That proviso seems to me to assume that the emptying the canal for the purpose of repairs and refilling it is a taking of the water "for the purpose of maintaining the navigation of the canal."

CROMPTON, J.—I am of the same opinion. I say nothing as to that part of the case upon which we reverse the judgment of the Court below, because I agree with the reasons which have been given. As to the other parts of the case, I will only make one remark with reference to what my brother *Coleridge* has said; I am not satisfied, as to either of the two requisites, that this case is within the

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clause in question, because it does not appear to me, with regard to the sunken boats, that the water was taken "for the purpose of maintaining the navigation." In the case of the repairs it is expressly found that the water was taken to make good the want of it in that particular portion of the canal. With regard to the sunken boats, I am by no means as satisfied that the purpose and main object of the parties was to maintain the navigation below the seventh lock: on the contrary, I am inclined to think that the purpose was to raise the sunken boats and remove them through the seventh lock, not "to maintain the navigation" below it. By "maintaining the navigation below the seventh lock" I understand, filling it with water, and having water enough in it to enable boats to pass through it. I also agree with my brother *Coleridge* on the other point: the case is not within the agreement, because the water was not taken at other times than when boats were passing through the canal. These boats were in the canal, and may fairly be taken to have been in the course of passage.

Judgment accordingly (a).

(a) Judgment of *nolle prosequi* had been entered up in the Court of Exchequer in the usual form, in pursuance of the provision to that effect in the special case (see 1 H. & N. p. 350.) In Hilary Term, January 15, *Phipson* applied for a rule to amend the judgment roll by striking out the words "wherefore the plaintiffs say that they will not further prosecute their suit against the defendant in respect of the premises," on the ground that it might be contended that error could not be brought on a *nolle prosequi*, and referred to *Box v. Bennett** and *Corsar v. Reed*.† [*Watson, B.*—By the 32nd section of the Common Law Procedure Act, 1854, error is to be brought upon the judgment upon the special case. Here upon the special case the Court has awarded a judgment of *nolle prosequi*. If that is wrong it can be set right by the Court of Error.]

POLLOCK, C. B.—The Court are all agreed that this is a mere matter of form.

Rule refused.

* 1 H. Bl. 432.

† 17 Q. B. 540.

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IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

MARIA OLDERSHAW and ROBERT MUSHET, Executrix and
 Executor of ROBERT OLDERSHAW v. WILLIAM THOMAS
 KING. June 22 & 23.
22.6.57

ERROR on the judgment of the Court of Exchequer on a special case. The case and judgment of the Court below, are reported, *ante*, p. 399.

Montague Smith (with whom was *W. M. Cooke*) argued for the plaintiffs. This guarantee is founded, not only upon the consideration of forbearance, but also upon the future advances which the parties contemplated. The word "therefore," incorporates the former part of the sentence in which it is found, and shews what was the *motive* or

In August 1848, the defendant entered and gave the following guarantee to O.—"I am aware that my uncles J. and J. F. K. stand considerably indebted to you for professional business and for cash advanced to them, and that it is not in their power to

pay you at present, and as in all probability they will become further indebted to you, though I by no means intended that this letter shall create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past or future transactions between you and my said uncles to a certain extent; and, therefore, in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum they may be indebted to you upon the balance of accounts at any time during the next six years to the extent of 1000*l.* whenever called upon by you to pay the same, and after twelve months previous notice." At the date of the guarantee J. and J. F. K. were indebted to O. in the sum of 513*l.* Subsequently O. advanced large sums of money to J. and J. F. K., and dealings went on till January 1849, when the debt due from them to O. amounted to 2184*l.*—*Held*, by the Court of Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the guarantee was founded on a sufficient consideration, and that further advances having been made and time given, it bound the defendant.

Per Curiam (dissentiente *Crompton, J.*), the consideration for the promise to guarantee was the keeping the account open and making further advances. *Per Crompton, J.*, that the consideration expressed being the forbearing to press for immediate payment, no other consideration could be implied. *Per Curiam*, that an agreement to forbear for a reasonable time is a good consideration to support a promise to guarantee a debt due from a third person.

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consideration which influenced the mind of the guarantor. On the other point, in addition to the authorities referred to in the Court below, he cited *Kennaway v. Treleavan* (a), *Caballero v. Slater* (b), *Chapman v. Sutton* (c), *Johnson v. Whitchcott* (d).

Petersdorff (with whom was *J. P. Norman*) for the defendant. The consideration agreed for is the forbearance to press for immediate payment: the future advances are no part of the consideration. There is but one promise, and that attached before any further advances were made; it is absolute and not conditional upon the making of such advances. On the other point, in addition to the cases referred to in the Court below, he cited *Philips v. Sackford* (e), *Tolhurst v. Brickinden* (f), *Deacon v. Gridley* (g), *Edwards v. Baugh* (h), *Wilkinson v. Byers* (i).

COCKBURN, C. J., now said.—I am of opinion that the judgment of the Court below must be reversed. The question arises on a contract of guarantee. (His Lordship read the defendant's letter). It was contended in the Court below and before us, that looking at the language of this document, it must be taken that the contract was based entirely on the consideration that Oldershaw would forbear to press for the immediate payment of the debt due to him at the time this letter was written; and it was said that the consideration was insufficient, an agreement to forbear to press for immediate payment being too vague to constitute the consideration for a promise; and several authorities

(a) 5 M. & W. 498.

(b) 14 C. B. 300.

(c) 2 C. B. 634.

(d) 1 Roll. Abr. 24.

(e) Cro. Eliz. 455.

(f) Cro. Jac. 250.

(g) 15 C. B. 295.

(h) 11 M. & W. 641.

(i) 1 A. & E. 106.

were cited in support of that position, and particularly the case of *Semple v. Pink* (a). We think, however, that this is not the true construction of the contract. I agree with what was said by the Lord Chief Baron in the Court below, that we must not construe this document with the strictness with which we should construe a pleading, but must look to the whole of the instrument in order to see what was the real meaning of the parties. Thus, though the words of promise on the part of the defendant follow immediately after the words "in consideration of your forbearing to press them for the immediate payment of the debt now due," we need not construe the words as we should the statement of a contract in a declaration. It stands thus, the defendant says, John and Joseph Francis King, being indebted to you for professional business, and cash lent and advances, and you having the right to close the account and insist on immediate payment, if, instead of doing so, you will leave the account open, and make further advances, although I do not ask you to bind yourself to do so, still, if you do so, I will be responsible to you to the extent of 1000*l*. The consideration is not simply the forbearing to press for immediate payment, but also the future advances, which, though not stipulated for, were contemplated by the parties. But supposing that the sole consideration was the forbearing to press for immediate payment, I should not be prepared to assent to the doctrine laid down in *Semple v. Pink* (a). These are authorities for saying that an agreement to forbear for a short time, or a little time, is too indefinite to constitute a consideration for a contract; but I am not at all prepared to assent to the proposition that an agreement to forbear for a reasonable time would not be sufficient. I see no reason why the question as to

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what is a reasonable time should not be considered and determined with reference to the circumstances of the case by a jury. As, however, in the view I take of this case, the contract discloses a sufficient consideration independently of such forbearance, it is not necessary to go the length of overruling *Semple v. Pink (a)*.

ERLE, J.—I concur in the opinion expressed by the Lord Chief Baron in the Court below, and the Lord Chief Justice in this Court, and therefore I think that the judgment of the majority of the Court below ought to be reversed. The first question is upon the construction of the document, whether it is a contract in consideration of time being given by the creditor to the debtor, or a contract in consideration of time being so given, and further advances to be made? Looking at the whole letter, and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion, that the consideration contemplated was, that further advance should be made, and time given by the creditor before he would press for the payment of the existing debt. Though the contract did not bind the creditor to make further advances, or to give time unless he chose to do so, it is clear that if he did make the advances and did give time, that which was contingent at the time when the instrument was written became an absolute and binding contract. I am also of opinion, that although the amount of further advances, and of the time to be given is not defined, still, if time is given and advances are made, it is enough. These undefined terms ought to receive a construction in reference to the facts given in evidence “ut res magis valeat

(a) 1 Exch. 74.

quam pereat." If the guarantor has had the advantage he bargained for, we must hold him to his promise. That suffices for the judgment of reversal in the present case. I concur with the Lord Chief Justice with respect to the case of *Semple v. Pink* (a). I do not assent to the doctrine that a guarantee in consideration of an agreement to give time is void unless the time to be given is defined in the contract. But it is not necessary to decide that point.

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WILLIAMS, J.—I am of the same opinion. I think that the case involves no question of law at all. It merely turns on the construction of the guarantee. In my opinion, the true meaning of the instrument is, that the defendant contracted with Oldershaw that if, without pressing for immediate payment, he would continue his transactions uninterrupted with the defendant's uncle, that the defendant would guarantee the payment of the balance of their account at any time within six years, to the extent of 1000*l*. If that was the true construction of the agreement, then the holding it valid is in accordance with all the authorities cited in the argument.

CROMPTON, J.—I do not disagree with the result of the judgments which have been delivered, but I am bound to say that I differ from the rest of the Court as to the construction of this contract. I think the view taken of the meaning of the parties by my brother *Bramwell* in his judgment is the correct one. I agree that we must see what is the promise and what is the consideration upon which it is founded, and that to ascertain this, we may look at all the facts of the case. And I quite agree with the

(a) 1 Exch. 74.

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doctrine established in the case of *Johnston v. Nicholls* (a), that where there is a consideration, that is sufficient to support a promise to guarantee either past or future debts. My brother *Maule* puts the case on the true ground, viz., that the substance of such a contract as the present, is, that in consideration that the plaintiffs will do something in future, the defendants promise, in like manner, to do something in future. Here, supposing that the consideration is good, it is clear it would support a promise to pay the balance, whether arising from new or old debts. Then what is the consideration? The answer to that question does not depend on any technical rule, but on a consideration of the whole document as a mercantile instrument, treating that which the parties have expressed in words as that which they really intended to express. I think the meaning is,—if you forbear to press for the immediate payment of the old debt, I will agree to guarantee the balance, whether it remain the same or whether it is added to. There are not two promises. It is one promise to pay the balance, whether arising from fresh dealings or from the former dealings. It is said to be part of the understanding that there should be fresh dealings; but I think that is not so, and that the parties meant the promise to apply, whether there were fresh dealings or not. To construe the document otherwise seems to me to be putting a meaning upon it different from that which the parties intended. *Oldershaw* is not to engage himself to make further advances, and it is clear to my mind that the defendant engaged to pay, if *Oldershaw* gave time: and, on the other hand, if *Oldershaw* did not give time, that no action could have been maintained on this guarantee, notwithstanding that he made fresh advances. Therefore, it seems to me that

(a) 1 C. B. 251.

the parties did not intend it to be, and we should be altering the contract if we make it a part of the consideration for the promise that there should be any fresh dealings. The consideration was that Oldershaw should not press for immediate payment, and I think that the giving a reasonable time is a sufficient consideration. In the old authorities mentioned in *Comyn*, it is said to be sufficient if there is an agreement for forbearance for a definite portion of time, or for a reasonable time; and in *Payne v. Wilson* (a) Lord *Tenterden* rests his judgment on the ground that it must be taken that the plaintiff had suspended proceedings for "a definite or reasonable time." I do not see any great difficulty in saying that what is a reasonable time may be determined at *Nisi Prius*. It may be difficult to say what a reasonable time is; but the difficulty is not greater than in many other cases where there is a promise to do a thing in a reasonable time. And the only distinct authority against that is the case of *Semple v. Pink* (b). The Court, however, in that case had really to decide whether there was a variance between the guarantee proved and that set out in the declaration. If I had to decide that case now, I should be inclined to say that a reasonable time might be implied, because no time was mentioned in the contract. That was the point before the Court.

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WILLES, J.—I am of the same opinion. Assuming that we are only to look to the words of the document and to see what is there stated as the consideration for the contract without regard to the previous recital; the consideration would appear to be "forbearing to press for the immediate payment of the debt due." There are many

(a) 7 B. & C. 423.

(b) 1 Exch. 74.

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authorities which shew that in cases like the present the word "immediate" may be construed to mean within a reasonable time to do the act in question (a). Accordingly, I think, that forbearing to press for immediate payment means forbearance for a reasonable time. Then it is said that that is not a sufficient consideration, because of the indefiniteness of the word "reasonable;" and because it might be competent to the person who enters into a contract, engaging to forbear for a reasonable time, to sue the next instant, or within a very short time. Looking for a moment to the mode in which the question of reasonable or unreasonable time would be determined, the difficulty vanishes. The question whether the creditor had forborne for a reasonable time or not would be determined by the jury. Now, suppose the consideration expressed had been forbearing for such a time as a jury who might try the question should consider reasonable, there can be no doubt but that it would be a perfectly good contract, and for a good consideration. That is what is tacitly expressed in this instrument. There are many cases in which the reasonableness of the time in which to do a thing, not being fixed by legal decisions, as in the case of the dishonor of a bill of exchange, it is left to the jury as a question of fact with reference to the circumstances of the particular case. I do not see on what principle an agreement to forbear for a time stipulated for by the parties should not constitute a good consideration. There are authorities to that effect: Com. Dig., Action on the Case on Assumpsit (B.) (B. 1.). In *Payne v. Wilson* (b), Lord *Tenterden* seems to treat it as clear, that the forbearance for a reasonable time would be a sufficient

(a) See *Thompson v. Gibson*, 8 M. & W. 281; *Page v. Pearce*, 8 M. & W. 677. The learned Judge referred also to *Regina v. Brownlow*, 11 A. & E. 119.
 (b) 7 B. & C. 423.

consideration. No doubt there are authorities on the other side, but if we are to choose between authorities, one class of which tends to defeat, and the other class to uphold the intention of the parties, I should have no difficulty in adhering to the latter class. The construction put upon this instrument by my brother *Crompton* was that which first suggested itself to my mind; but I think that it is not likely that the parties, in the relation in which they stood to each other at the time the guarantee was given, looked to forbearance alone as the consideration. There is a recital which shews that it was expected that the dealings would continue between Oldershaw and J. and J. F. King. I find by the subsequent part of the instrument, that it was supposed that they might continue during six years; and then there is the suggestion that "in all probability they will become still more indebted," evidently expressing a desire that the advances should be continued, not binding the creditor to make advances, but to induce him to make them. Probably, therefore, the most just construction of the instrument is that which has been put upon it by my Lord Chief Justice and my brothers *Erle* and *Williams*. But in either view of the case the plaintiffs are entitled to recover, and the judgment of the Court below ought to be reversed and judgment given for the plaintiffs, both as to past and future advances.


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Judgment reversed.

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MEMORANDUM.

In the present Vacation The Honorable *Edmund Phipps*, *Charles Wordsworth*, *John Locke*, and *Allan Maclean Skinner*, of the Inner Temple, *J. W. Huddleston*, and *Robert Lush*, of Gray's Inn, *J. Monk*, of the Middle Temple, *William Forsyth*, of the Inner Temple, and *Henry Manisty*, of Gray's Inn, Esquires, Barristers-at-law, were appointed her Majesty's Counsel; and *Gillery Pigott*, Serjeant-at-law, received a patent of precedence to rank next after *John Locke*, Esquire.



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MICHAELMAS TERM, 21 VICT.

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Nov. 3.

EVANS and Another v. WRIGHT.

THE first count of the declaration was in trover for goods and chattels. The second count was for money had and received by the defendant for the plaintiffs' use.

Pleas: to first count, Not guilty.—To second count: Never indebted.—Issues thereon.

At the trial before *Channell, B.*, at the Middlesex sittings in last Trinity Term, it appeared that one Davis being indebted to the plaintiffs for money advanced, by indenture of the 12th August, 1856, assigned to the plaintiffs, as a security, his household furniture. The indenture contained a proviso that if Davis paid to the plaintiffs the principal money and interest on the 12th August, 1857, or at such earlier day as the plaintiffs should appoint for payment

Where goods distrained for rent in arrear have been removed to a convenient place for sale and sufficient sold to satisfy the distress, the proper course is for the broker to leave the surplus money with the sheriff and return the surplus goods to the premises from whence he took them.

D. assigned his furniture to the plaintiff as a security for

money advanced. The deed of assignment provided that on default in payment of the principal or interest on a day named, or such earlier day as the plaintiff should appoint by notice, it should be lawful for the plaintiff to take possession of the furniture; but that until default D. should hold it. D. being indebted to his landlord for rent, the defendant, a broker, distrained the furniture. The plaintiff gave notice to D. to pay the principal money and interest, and he afterwards gave notice to the defendant that D. had assigned the furniture to him. The defendant on receiving this notice said that he would "take care it was properly acted on." The goods were removed from D.'s house to an auction room, and sufficient having been sold to satisfy the distress, the defendant returned the surplus goods to D.'s house and gave the surplus money to D.—*Held*: First, that there was no conversion of the goods by the defendant: Secondly, that the action for money had and received could not be maintained for the surplus money.

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thereof by a notice in writing to be given to Davis "at least two days before the day to be appointed for payment," the indenture should be void: but if default should be made in payment of the principal or interest, it should be lawful for the plaintiffs to take possession of the furniture: and it was thereby agreed, that until default should be made in payment Davis should hold, make use of and enjoy the furniture, without any manner of hindrance or disturbance of or by the plaintiffs. Davis being indebted to his landlord for rent, on the 24th February, 1857, the defendant, as the bailiff of the landlord, distrained the furniture of Davis. On the 2nd March the plaintiffs gave to Davis notice in writing to pay the principal money and interest "within two days from the date of the notice." At the request of Davis the defendant remained in possession of the goods, under the distress, until the 4th March. On that day the plaintiffs gave notice to the defendant that Davis had assigned his furniture to them by the indenture of the 12th August, 1856. On receiving this notice the defendant said he would "take care it was properly acted on." The rent remaining unpaid, the furniture was removed to an auction room, and on the 7th March it was put up for sale. The sale proceeded until sufficient was realised to pay the rent due and expenses, when the sale was stopped and the portion of the furniture not sold was returned to Davis, together with 17s. the balance of the proceeds. Davis afterwards sold the furniture and absconded.

It was objected on behalf of the defendant, that under these circumstances, there was no evidence of a conversion of the goods by the defendant, or of money received by him for the plaintiffs' use. The learned Judge was of that opinion and nonsuited the plaintiffs.

Morgan Lloyd, in the same term, obtained a rule nisi for a new trial, against which

Montague Smith and Kingdon now shewed cause.—First, by the indenture of the 12th August, 1856, Davis was to remain in possession of the goods until default in payment of the principal or interest. That stipulation operated as a redemise of the goods to Davis until such default: *Wilkinson v. Hall* (a), *Doe d. Lyster v. Goldwin* (b). But there has been no default, inasmuch as the notice to pay the principal and interest was not in conformity with the requisites of the deed. The deed requires “at least two days” notice: that means two days exclusive of the day of notice: *Regina v. The Aberdare Canal Company* (c), *Regina v. The Justices of Shropshire* (d).—Secondly, assuming that the plaintiffs were entitled to the goods, there has been no conversion of them by the defendant. The statute, 2 Wm. & M., sess. 1, c. 5, s. 2, provides for the disposal of the overplus of the sale, but the law makes no provision with respect to the surplus goods. Under those circumstances the proper course was to restore those goods to the place from whence they were taken. The defendant was not bound to decide who was entitled to them. The goods continued in the custody of the law until the termination of the sale. If the plaintiffs had brought an action on the case for irregularity in dealing with the distress, they must have proved actual damage: *Rodgers v. Parker* (e), but they have sustained none, for when the surplus goods were returned they were in the same situation as if the goods had never been taken. If the defendant’s reply, on receiving the notice, amounts to a promise to give the goods to the plaintiffs, it was without consideration and therefore not binding; and the mere fact that the defendant may have been influenced by an improper motive will not render him

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(a) 3 Bing. N. C. 508.

(b) 2 Q. B. 143.

(c) 14 Q. B. 854.

(d) 8 A. & E. 173.

(e) 18 C. B. 112.

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liable: *Heald v. Carey* (a).—Thirdly, the count for money had and received cannot be supported. *Yates v. Eastwood* (b) is an express authority that where a party distraining is not guilty of any misconduct with regard to the distress, an action for money had and received will not lie for the overplus of the sale, but the proper remedy is an action on the case, under the statute 2 Wm. & M. sess. 1, c. 5, s. 2, for not leaving the overplus in the hands of the sheriff.

Morgan Lloyd, in support of the rule.—First, the notice was sufficient. No doubt Davis could not have been compelled to pay until after the expiration of two days, exclusive of the day of notice; but five days intervened between the day of notice and the sale. Moreover, no notice was necessary. The indenture contains an absolute assignment of the goods to the plaintiff: then there is a covenant by him that Davis may remain in possession until a certain event. *Wilkinson v. Hall* (c) and *Doe d. Lyster v. Goldwin* (d) have no application: they were cases of mortgage of land, and the law of real property is based on different principles from that of personal property. Besides, the defendant is precluded by his own conduct from objecting to the notice.—Secondly, there was evidence of a conversion of the goods by the defendant. The rule which prevails as to sheriffs does not extend to landlords. The defendant was a bailee of the goods, and when he received notice that they belonged to the plaintiff he was bound to re-deliver them to him. [*Bramwell, B.*—Suppose the owner of the goods lived at York.] He ought to have an opportunity of sending for them. A delivery to a wrong person is a conversion: also a delivery to the right person at a

(a) 11 C. B. 977.

(b) 6 Exch. 805.

(c) 3 Bing. N. C. 508.

(d) 2 Q. B. 143.

wrong place, if by the negligence of the bailee in so doing they become lost to the owner: *Stephenson v. Hart* (a). (He also referred to Story on Bailments, sect. 350, *Crouch v. The Great Western Railway Company* (b).)—Thirdly, the count for money had and received may be supported. *Yates v. Eastwood* (c) does not conclude this case. The object of the 2 Wm. & M. sess. 1, c. 5, s. 2, was to protect landlords by enabling them to leave the surplus of the distress with the sheriff, in cases where it was not known to whom it belonged. That has no application to a case like this, where the party distraining has distinct notice from the owner of the goods, and agrees to hand over the surplus to him.

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POLLOCK, C. B.—The rule must be discharged. It was granted on two grounds: first, that there was evidence of a conversion; secondly, that there was evidence of money had and received. I am of opinion that the plaintiffs cannot succeed on either ground. The expression of the defendant on receiving the notice, “that he would take care that it was properly acted on,” merely amounts to this: “I have received your notice and will do what is proper under the circumstances.” What was proper, was to leave the surplus money with the sheriff and restore the goods to the place from whence they were taken. A landlord has a right to distrain for rent in arrear on any goods found on the premises, and if upon the sale there is a surplus, he may well say “I will not be embarrassed or made responsible by the claim of any person, but I will hand over the surplus money to the sheriff and send back the goods to the place from whence I took them.” I think that the direction of the learned Judge was right, and that there was no evidence of a conversion or of money had and received.

(a) 4 Bing. 476.

(b) *Antè*, p. 491.

(c) 6 Exch. 805.

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BRAMWELL, B.—I am of the same opinion. The questions for our consideration are, whether there was evidence of a conversion, and of money had and received. I never hear those unfortunate expressions without regretting that they were ever adopted. To my mind they convey no definite idea. There is no standard, no rule, to which we can refer the terms “conversion” and “money had and received;” and I am content to look at them, according to the decisions, as meaning whether the plaintiff has a cause of action. Then I think that in this case there is no cause of action, and consequently no conversion. Assuming the facts to be, that the plaintiffs’ goods were distrained by the defendant, and that the defendant removed them and sold enough to realize the rent and costs, and restored the surplus to the premises from whence he took them, it is impossible to say, in any meaning of the word “convert,” that such a use of the goods was a conversion of them. But it is said that the plaintiffs, who were the true owners, having given notice of their title to the defendant, and the defendant having recognized it, thereupon some duty arose, the breach of which, in some way or other, is a conversion. I am of opinion that there was no conversion because there was no cause of action; and there was no cause of action because the defendant had a right to return the goods to the place from whence he took them, and in no way had he forfeited that right. If he had thought fit, he might have acknowledged the receipt of the notice and have said, “I will not trouble myself with deciding whether or no Davis is the true owner of the goods, but I will take them back to the place where I found them.” I am clearly of opinion that the defendant had an original right to return the goods to the place from whence he took them, that he has not forfeited that right, and consequently there is no cause of action and therefore no conversion.—Then, with respect to the count for money had and received, the defendant had a

right to protect himself by handing over the surplus money to the sheriff, and if he had done so, would an action for money had and received have been maintainable against him? Certainly not, without notice to him to pay it to the plaintiffs. Then does the notice make any difference? In my opinion it does not. He had a right to hand over the money to the sheriff: he does not do so, but hands it to Davis. The handing it to Davis did not take away his right to hand it to the sheriff; but, according to the authority of *Yates v. Eastwood* (a), rendered him liable to an action on the case under the statute 2 Wm. & M. sess. 1, c. 5. That being so, how can the plaintiffs maintain an action for money had and received, which is founded on contract? It seems to me that there is no cause of action on that ground, and therefore the count for money had and received is not maintainable.

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WATSON, B.—I am of the same opinion. I agree that my brother *Channell* was right in saying that there was no evidence of a conversion or of money had and received. The distress was perfectly lawful, and under the statute 2 Wm. & M. sess. 1, c. 5, the goods were removed to a convenient place for sale. It turned out that there was an overplus of goods, and thereupon a duty was imposed on the defendant which is not defined either by the common or statute law, or any decided case. Then, what was the defendant to do with the goods? I think that he was bound to return them to the place from whence they came or put them in some convenient place, giving the owners notice where they might find them. Then, what is the definition of a "conversion?" According to the case of *Heald v. Carey* (b), there must be an exercise of dominion over the property inconsistent with the title of the real

(a) 6 Exch. 805.

(b) 11 C. B. 977.

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owner. That case is not dissimilar to the present: there the bailee took the property and placed it in a custody which was consistent with the title of the owner; here the person who took the property merely put it in a place where the owner might take it, for he returned it to the house in respect of which the rent was due; and that was not done in defiance of the title of the owner, but for the purpose of safe custody. Davis afterwards fraudulently sold the property; but there was no evidence that the defendant exercised a dominion over it inconsistent with the plaintiffs' title. The notice did not make the defendant a wrong doer: he did not undertake to deliver the goods to the plaintiffs, but said that the notice should be properly attended to, that is, when the rent and costs were satisfied out of the distress he would leave the overplus in safe custody for the plaintiffs.—With respect to the count for money had and received, *Yates v. Eastwood* is a distinct authority that, under these circumstances, an action for money had and received will not lie, but the proper remedy is under the statute 2 Wm. & M. sess. 1, c. 5, s. 2.

CHANNELL, B.—I agree that the rule ought to be discharged. The defendant was justified in making the distress and selling the goods off the premises; and, without saying that he was bound to return the overplus goods to the premises, I think that his doing so did not amount to a conversion. As to the other point, *Yates v. Eastwood* is decisive.

Rule discharged.

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HARRIS v. THE OFFICIAL MANAGER OF THE ROYAL
BRITISH BANK.

Nov. 5.

ON the 24th March, 1857, the plaintiff recovered a judgment against the Royal British Bank, for the sum of 4866*l.* 4*s.* 7*d.*, and costs. On the 2nd May a memorandum of the judgment was filed with the senior master of the Court of Common Pleas (*a*). This memorandum stated, that the person whose estate was intended to be affected by such entry was H. B., Esq., of &c., one of the registered shareholders of the Royal British Bank. A summons was taken out, calling on the plaintiff to shew cause why the entry of the judgment should not be struck out, so far as it sought to affect the estate of H. B., Esq., on the ground that no judgment has been entered up against him; and that there was nothing to warrant such an entry. The summons was heard before *Willes* J., who made an order accordingly; but directed that it should not be acted on before the fifth day of the present term.

Semble: That a judgment against a banking co-partnership, established under the 7 & 8 Vict. c. 113, cannot be registered so as to affect the estate of a shareholder against whom no judgment has been obtained.

Phipson now moved to set aside the order of *Willes*, J.—By the 7 & 8 Vict. c. 113, ss. 1, 6, no joint stock banking company can be established after the 6th May, 1844, unless by letters patent from the Crown, by which it becomes incorporated. Section 9 enacts, “That every judgment, decree, or order of any Court of justice in any proceeding against the Company may be lawfully executed against, and shall have the like effect on, the property and effects

(*a*) See 1 & 2 Vict. c. 110, s. 19.

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of the Company, and also, *subject to the provisions hereinafter contained*, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding." If the words "subject to the provisions hereinafter contained" had been omitted, the enactment would clearly have given to a judgment against the Company the same effect as if it had been obtained against every individual shareholder. Then, do those words make any difference? It is submitted that they only refer to the mode of enforcing the judgment against the Company by execution against the shareholders. "Subject to," &c., means "except as altered by the subsequent provisions; and the 9th section is in part altered by the 10th and 13th, which prescribe the mode and order of proceeding to execution against shareholders. [*Channell, B.*—By the 13th section execution cannot issue against a shareholder without permission of the Court or a Judge; then, ought not a creditor to obtain leave to issue execution against the shareholder before registering the judgment, so as to affect his estate?] The 10th section provides that execution may issue, in the first instance, against the Company, then against any shareholder or former shareholder: those are provisions to which the enactment in the 9th section is subject; but there is no provision referable to the words "shall have the like effect on the property and effects of the Company, and also upon the person, property and effects of every shareholder." [*Pollock, C. B.*—When we look at the spirit of the Act, it seems monstrous to say, that though a creditor cannot have execution against the person or property of a shareholder without leave of the Court, yet he may tie up his whole estate by registering the judgment against him.]

The Court then said, that as the point was referred to them by the learned Judge, the plaintiff was entitled to a rule nisi; but they thought it would be unwise to draw it up, whereupon

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Phipson declined to take a rule (a).

(a) See *Fell v. Burchett*, 7 E. & B. 537.

CURTEIS v. THE ANCHOR INSURANCE COMPANY.

Nov. 14.

THE declaration in this case was on a deed poll, executed by three of the directors of a Joint Stock Company, for certain arrears of an annuity granted by the Company to the plaintiff.

The defendants applied to *Martin*, B., at Chambers, for leave to plead the following several matters.—First: Non est factum. Secondly: that the deed was invalid under the 7 & 8 Vict. c. 110, s. 29. Thirdly: that the directors, making the deed, had no power to bind the Company; that it was an excess of authority, and to the prejudice of the shareholders, and that the plaintiff knew the circumstances when he took it. The learned Judge refused to allow both the two last pleas, on the ground that the subject-matter of the second might be given in evidence, either under the first or the third.

Raymond having obtained a rule nisi to plead the above matters,

Aspland shewed cause.—The second and third pleas ought not to be allowed to be pleaded together. The second is founded on the 29th section of the Joint Stock

To a declaration on an annuity deed executed by three directors of a Joint Stock Company, the Court allowed the defendants to plead the following pleas, the second and third being verified by affidavit.—First: non est factum. Secondly: that the deed was invalid under the 7 & 8 Vict. c. 110, s. 29. Thirdly: that the directors making the deed had no power to bind the Company; that it was an excess of authority and to the prejudice of the shareholders, and that the plaintiff knew the circumstances when he took it.

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Companies Registration Act, 7 & 8 Vict. c. 110, which enacts, "that if any contract or dealing (except a policy of assurance, grant of annuity, or contract for the purchase of an article or of service, which is respectively the subject of the proper business of the Company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers) shall be entered into, in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting." The second plea is therefore bad on the face of it, for the action is founded on the grant of an annuity, and such a contract is expressly excepted by the statute. Moreover, the plea is unnecessary, since the subject matter of defence may be given in evidence under non est factum; for the statute says that no such contract shall have force until approved and confirmed by the shareholders. At all events the second plea ought not to be allowed together with the third.

Raymond, in support of the rule.—The question is not whether the pleas are good, but whether they are founded on the same ground of defence, in violation of the Reg. Gen. Trin. T., 1853. If the Court refuse to allow the pleas, because they may be open to demurrer, the defendants will be deprived of their right to bring the matter before a Court of error. The second and third pleas are not only distinct on the face of them, but different evidence would be required in support of each. The second is simply a plea that the deed is invalid, because certain statutory requisites have not been complied with. The

third is a plea of illegality, and is founded on the dictum of the Court of Queen's Bench, in their judgment in *The Royal British Bank v. Turquand* (a), viz. "If the directors had exceeded their authority to the prejudice of the shareholders by executing the bond, and this had been known to the obligees, illegality, we think, would have been shewn. The obligors in executing, and the obligees in accepting the bond, might be considered as combining together to injure the shareholders: the two parties would have been in *pari delicto*, and the action could not have been maintained." That is clearly a different subject matter of defence from that contained in the second plea.

It having appeared that the time for pleading expired on this day (Saturday),

Per CURIAM.—The rule may be absolute, on condition that an affidavit of the truth of the second and third pleas be delivered to the plaintiff on Monday next; and in default that the third plea be struck out: the pleas to be delivered to-day (the plaintiff to be at liberty forthwith to reply and add a rejoinder or demur) and the defendants to take such notice of trial for the second sittings in term, in London, as the plaintiff can give.

Rule accordingly.

(a) 5 E. & B. 248, 261. In error, 6 E. & B. 327.

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Nov. 24.

MONK and Another v. SHARP.

On the 26th of June the plaintiffs, who were traders, petitioned the Court of Bankruptcy for protection, under the 211th section of the Bankrupt Law Consolidation Act. They filed an account of debts, and made a proposal according to s. 214. At an adjourned meeting on the 6th of August, the plaintiffs did not attend, and neither the proposal nor any modification of it was accepted, whereupon the meeting was adjourned to the public Court and the plaintiffs were adjudged bankrupts under s. 223. The adjudication was not founded on the petition of a creditor, nor was the

plaintiff's petition considered. On the said 26th of June the defendant was indebted to the plaintiffs. On the said 26th of June the plaintiffs assigned this debt to Messrs. D., and gave notice thereof to the defendant. Messrs. D. had at the time of the assignment of the debt to them notice of the petition for arrangement.—*Held*: First, that the filing the petition for arrangement was not an act of bankruptcy; that petition never having been actually dismissed, and no petition for an adjudication of bankruptcy having been filed within two months, in pursuance of s. 76. Secondly, that where a trader is adjudicated bankrupt under the 223rd section without the filing of a petition by a creditor, the bankruptcy has no relation back to any act done by the bankrupt prior to the adjudication. Thirdly, that, for the reasons above mentioned, the plaintiffs were entitled to recover the debt in question, as trustees for Messrs. D., notwithstanding the bankruptcy.

BY consent of the parties, and order of a Judge, the following case was stated for the opinion of the Court:—

The declaration was for goods sold, &c. Plea: That after the accruing of the debt, and before suit, the plaintiffs were duly adjudged bankrupts; that afterwards J. Christie, J. T. Perrins and W. Howells were appointed assignees of the estate and effects of the plaintiffs, whereby, and by force of the statutes, the said assignees became entitled to the said debt, &c.: that after the said appointment, and before this suit, the assignees, being so entitled, required the defendant to pay to them the said debt, and that the defendant before this suit paid the said debt to the assignees, and thereby satisfied and discharged the plaintiffs' claim in respect thereof.

Replication:—That before they became bankrupt, the plaintiffs, by indenture between the plaintiffs of the one part, H. Duignan and W. H. Duignan of the other part, for a good and valuable consideration, assigned to H. Duignan and W. H. Duignan the said debt; and appointed H. Duignan and W. H. Duignan their attornies to sue for and recover the said debt, whereof the defendant, before the plaintiffs became bankrupt, and before he paid the debt to the said assignees, had notice: that this action is com-

menced and prosecuted in the names of the plaintiffs, and for the sole use and benefit, and at the instance, of the said H. Duignan and W. H. Duignan, and for the purpose of enabling them to recover the said debt, and not for the use and benefit of the plaintiffs or their said assignees, who have no beneficial interest therein.

The defendant joined issue on the replication, and also rejoined:—That, before the making of the indenture, the plaintiffs committed an act of bankruptcy within the meaning of the statutes in such case made: that, at the time of the making of the said indenture, H. Duignan and W. H. Duignan had notice that such prior act of bankruptcy had been committed by the plaintiffs.—Whereupon issue was joined.

The defendant was a partner in the Faversham Gas Company, and, as such, was indebted to the plaintiffs in 61*l.* 12*s.* 8*d.*, for goods sold to the Company.

On the 26th of June, 1855, the plaintiffs, being traders and indebted to various persons, presented a petition to the Birmingham District Court of Bankruptcy, for arrangement with their creditors, in pursuance of the 211th section of the Bankrupt Law Consolidation Act, 1849.

On the 6th July, the plaintiffs executed a deed, made between the plaintiffs of the one part, and H. Duignan and W. H. Duignan of the other part, whereby the plaintiffs purported to assign the said debt of 61*l.* 12*s.* 8*d.* to H. Duignan and W. H. Duignan. At the time of the execution of the deed, the plaintiffs were not indebted to Messrs. Duignan; but it was anticipated that the plaintiffs ~~would~~ shortly require an advance of money from them for a particular purpose, and the deed was intended to be a security for such advance; and an advance of 65*l.* 15*s.* 3*d.* was accordingly made by Messrs. Duignan to the plaintiffs, prior to the 6th of August, 1855. On the same day on which

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the said deed was executed, notice of it was sent by Messrs. Duignan to the defendant, who duly received such notice. W. H. Duignan acted in the matter of the petition, which was witnessed by him as solicitor for the plaintiffs, and both the said H. Duignan and W. H. Duignan knew, on the 26th of June, 1855, that the petition had been presented by the plaintiffs, and had notice of the same at the time of the execution of the deed, and the advance of the money to the plaintiffs.

At the time of presenting their petition, protection was granted to the plaintiffs under the said Act, until the 27th of July, 1855, and the private sitting of the Court, in the matter of the said petition, was appointed for that day; but the said private sitting was afterwards adjourned until the 6th of August, 1855.

Ten days before the 6th of August, the plaintiffs filed their accounts and proposal, pursuant to the 214th section; and in their account of debts so filed was included the debt for which this action is brought. The proposal was witnessed by W. H. Duignan.

The plaintiffs did not attend the sitting of the Court on the 6th August, nor was their proposal or any modification thereof assented to at the said sitting, or at any adjournment thereof; and thereupon the Court, on the 6th of August, 1855, adjourned all further proceedings in the matter into the public Court, and there adjudged the plaintiffs bankrupt, and advertised such adjudication, and appointed sittings for choice of assignees and for the last examination as in bankruptcy.

Assignees were duly appointed under the said adjudication of bankruptcy, to whom the defendant paid the sum of 61*l.* 12*s.* 8*d.*, and he has ever since refused to pay the same to the plaintiffs or Messrs. Duignan.

This action was commenced on the 16th July 1856, and

is brought in the name of the plaintiffs, for the sole benefit of the said H. Duignan and W. H. Duignan.

The Court is to be at liberty to draw such inferences from the above facts as a jury might draw.

The question for the opinion of the Court is, whether, under the circumstances, the plaintiffs are entitled to recover 61*l.* 12*s.* 8*d.* from the defendant. If the Court shall be of that opinion, the defendant agrees that judgment shall be entered by confession against him. If not, the plaintiffs are to enter judgment of *nolle prosequi*.

Gray argued for the plaintiffs (Nov. 16) (*a*).—The question is, whether, in the present case, there is any act of bankruptcy to which the claim of the assignees can have relation back; the plaintiffs having become bankrupt on the 6th of August, after the assignment of the debt to Messrs. Duignan. By the 211th section of the Bankrupt Law Consolidation Act, 1849, a “trader, unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them, under the superintendence and control of the Court of Bankruptcy, and of submitting himself to the jurisdiction of the Court,” in manner thereafter mentioned, is empowered “to present a petition to the Court, setting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order; and the Court, on such petition,” is to have power to grant such protection. By the 213th section it is enacted, “that forthwith, after the granting of any order for protection, the Court shall appoint a private sitting, to be held at such time and place as it may name; and shall, at the same time, appoint an official assignee to act in the matter of such petition, and upon sufficient cause shewn may, if it shall

(*a*) Before *Pollock*, C. B., *Bramwell*, B., *Watson*, B., and *Channell*, B.

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think fit, direct that the estate and effects of the petitioner, or any part thereof, shall be possessed and received by such official assignee, or be taken possession of by the messenger of the Court." There is nothing in this section to vest the property in the assignee. But, by the 218th section, upon the approval and confirmation by the Court of the resolution or agreement embodying the proposal of the petitioner, "the estate and effects of such petitioning trader shall vest in the official assignee, if such shall be required, by virtue of such resolution," &c. By the 223rd section, if the proposal of the petitioner be not assented to, the Court may adjudge the petitioner a bankrupt. Nothing in these sections has the effect of vesting any interest in the assignees before the adjudication. The 76th section enacts, "that the filing of a petition by any such trader, for an arrangement between such trader and his creditors, under the provisions of this Act with respect to arrangements between debtor and creditor under the superintendence and control of the Court, shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such trader at the time of filing such petition, provided such a petition for adjudication of bankruptcy shall be filed against him within two months after such petition for arrangement shall have been dismissed." That section therefore applies only where there is a petition by a creditor. Here there was no petition for adjudication. The 76th section goes on to provide, that "no adjudication shall be made on any such act of bankruptcy, unless and until after such petition for arrangement shall have been dismissed." In the present case the petition for arrangement never was dismissed.—*Ex parte Harrison in re Lawford* (a) is an authority in favour of the plaintiffs. Lord Justice Turner there said:—"It could not be intended

(a) 26 L. J. N. S. Bankruptcy, 30.

that a petition, under the arrangement clauses, should be an act of bankruptcy in all cases. If it were so, it would be possible for a creditor to make a petitioner a bankrupt at any time within twelve months after its presentation, whereas, by the 76th section of the Bankrupt Act, the filing of such a petition is to be conclusive evidence of an act of bankruptcy, provided the petition for adjudication is filed within two months after the dismissal of the petition for arrangement." In *Stevenson v. Newnham* (a) it was held that, where an adjudication of bankruptcy proceeded on the bankrupt's own application, his assignees could not treat an alleged fraudulent preference by him as an act of bankruptcy. So in *Nicholson v. Goach* (b), where an adjudication proceeded on the 223rd section, it was held that the title of the assignees could not relate to any prior act of bankruptcy.

J. A. Russell, for the defendant.—The title of the assignees is not founded upon the doctrine of relation. The simple question is, whether the filing a petition for arrangement, under the 211th section, is an act of bankruptcy. In the case of *Ex parte Harrison re Lawford* (c) the judgment of Lord Justice *Knight Bruce* does not contain language similar to that used by the Lord Justice *Turner*. [*Pollock*, C. B.—The effect of that decision is, that a right of action for breach of contract was liquidated and turned into a money demand: that could only be done before bankruptcy. *Bramwell*, B.—The only doubt I entertain as to that case is, whether the right of action ever was converted into a liquidated demand?] The 76th section may be construed as making the presentation of a petition within two months the condition upon which a hostile

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(a) 13 C. B. 285.

(b) 5 E. & B. 999.

(c) 26 L. J. N. S. Bankruptcy, 30.

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creditor may obtain an adjudication ; and not as rendering it necessary that such petition should be presented by a creditor, in order to constitute the filing a petition for arrangement, under the 211th section, an act of bankruptcy. Surely a trader, after the presentation of such petition, cannot make such a bargain as that mentioned in the present case. [*Bramoell*, B.—If any creditor is dissatisfied he may refuse to come in, and may then present a petition for adjudication.] It is said that the petition was not dismissed ; but the 223rd section is imperative:—"If the petitioning trader does not attend the Court, the petition shall be dismissed." The effect is, that in such case the petition dismisses itself. The assignment was a fraudulent preference, and therefore void by section 133.

Cur. adv. vult.

The judgment of the Court was now delivered by

WATSON, B.—This case was argued before us in the course of this Term. The facts were few. The plaintiffs were traders, and on the 26th June, 1855, petitioned the Court of Bankruptcy for an arrangement under the 211th section of the Bankrupt Law Consolidation Act, 1849. At an adjourned meeting, on the 6th of August, the plaintiffs did not attend. Neither the proposal, nor any modification thereof, was accepted by the creditors, therefore the meeting was adjourned to the public Court, and the plaintiffs were adjudicated bankrupts. The petition was not dismissed, nor was the adjudication founded on the petition of any creditor of the plaintiffs. Between the petition for arrangement and the adjudication in bankruptcy, on the 6th of July, 1855, the plaintiffs assigned the debt, sought to be recovered in this action, to Messrs. Duignan, and notice of such assignment was, on the same day, given to the defend-

ants. The questions are, whether or not this debt passed to the assignees of the plaintiffs? If the assignment of the debt was good, and not affected by the bankruptcy, the plaintiffs are entitled to judgment. On the other hand, if the debt passed to the assignees, the defendant is entitled to our judgment.

It was argued, on the part of the defendant, that the petition or arrangement was an act of bankruptcy, of which the plaintiffs had notice, and that the subsequent bankruptcy related back to the act of bankruptcy, and rendered the assignment void. This question turns on the true interpretation of the 76th and 223rd sections of the Bankrupt Law Consolidation Act, 1849. We think that the petition for arrangement was no act of bankruptcy under the 76th section of the Bankrupt Act. That clause enacts, that the filing of a petition by a trader, under the arrangement clauses, "shall be accounted and adjudged conclusive evidence of an act of bankruptcy, provided a petition for adjudication shall be filed against him within two months after such petition for arrangement has been dismissed: provided also, no adjudication shall be made until after such petition for arrangement has been dismissed." The 223rd section provides, that where a trader does not appear or file his accounts the petition shall be dismissed, and amongst other events, if the proposal or modification thereof is not assented to, at a public meeting, the Court of Bankruptcy shall adjourn to the public Court, where they shall adjudge the trader to be a bankrupt.

It is quite clear that the petition for arrangement was not dismissed, and consequently no petition by a creditor was or could be filed under the 76th section; and we are of opinion that no act of bankruptcy was committed, for the condition on which the petition for arrangement could be rendered an act of bankruptcy has not, and cannot now be performed. We therefore concur in the opinion ex-

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pressed by the Lord Justice in the case cited before us: *Es parte Harrison in re Lawford* (a). This would entitle the plaintiffs to our judgment. But we think that the 223rd section of the Bankrupt Law Consolidation Act, which provides for cases like the present, where the Bankruptcy Court, without any petition for bankruptcy, adjudges the trader a bankrupt, does not cause any relation to any prior act of bankruptcy. Under the old bankrupt law, as it is well known, transfers of goods, with notice of a prior act of bankruptcy, were avoided, and the title of the assignees related to the act of bankruptcy, provided the petitioning creditor's debt then existed. But under the Bankrupt Law Consolidation Act, 1849, where the fiat or adjudication of bankruptcy is obtained on the petition of the bankrupt himself, under the 70th section of the present Act, there is no relation to any act of the bankrupt prior to the fiat or adjudication: *Stevenson v. Neunham* (b), *Nicholson v. Gooch* (c). We think that these decisions govern the present case.

It was further contended that the assignment was fraudulent, but for this there really is no foundation. Therefore we think that the plaintiffs are entitled to our judgment.

Judgment for the plaintiffs.

(a) 26 L. J. N. S. Bankruptcy, 80.

(b) 13 C. B. 285.

(c) 5 E. & B. 999.

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ENTWISLE v. ELLIS.

Nov. 18.

THE declaration stated, that the plaintiff by a policy of insurance caused himself to be insured, lost or not lost, at and from Calcutta to Mauritius, including craft risk to and from the vessel, on any goods in any ship or ships; the goods to be valued, on rice as to be declared: warranted free of particular average, unless the vessel be stranded, sunk, or burnt. And touching the adventures and perils, which the defendant took upon himself, they were, amongst other things, of the seas, jettisons, &c.; and that by a memorandum thereunder written, corn, fish, salt, fruit, flour, and seed were warranted free from average, unless general or the ship were stranded; sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under 5 per cent.; and all other goods were warranted free from average under 3 per cent., unless general or the ship were stranded.—Averments: that the defendant subscribed the policy as an insurance of the sum of 200*l.* upon the said rice: that the plaintiff afterwards, by indorsement on the policy, declared the insurance to be to the amount of 4000*l.*, and his interest to consist of 500 bags of rice, marked [R], shipped on board the “Laidmans,” 4,500 bags on board the “Margaret Skelly,” and 1000 bags on board the “Tanjore;” and that each bag of rice was of the value of 8*s.* 3*d.* of which the defendant had notice (a): that the rice was shipped at

On an insurance of goods in “ship or ships” which were declared to be and to be valued “on rice, to be declared free from particular average,” the insurer cannot, by indorsing a declaration of interest with a separate valuation of each bag of rice, create a separate insurance on each bag.

A policy of insurance, having been effected on goods “in ship or ships,” declared to be “on rice, to be declared free from particular average,” the insured indorsed on the policy a declaration which was afterwards marked with the initials of the underwriters, as follows:—

[R] 500 bags rice, per “Laidmans,” @ 8/3 per bag, 206*l.* 5*s.*; [R] 4,500 bags rice, per “Margaret Skelly,” @ 8/3 per bag, 1,856*l.* 5*s.* From each ship certain of the bags of rice were safely landed at their port of destination; others were jettisoned, being cast into the sea to save the ship; others, in the “Laidmans,” on arriving at their port of destination, were cast into the sea, being unfit for consumption: others, in the “Margaret Skelly,” were so much injured by sea damage as to be sold at the port of departure to which that ship was obliged to put back. The underwriters had paid the loss on the goods jettisoned.—*Held*, that the assured were not entitled to recover the value of the bags of rice cast into the sea at the port of destination or sold at the port of departure.

(a) After the argument *Wilde* declaration was initiated by the applied for leave to amend by defendant, and leave was granted adding an allegation that the accordingly.

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Calcutta on board the ships as declared; that the plaintiff was and continued interested; and that the insurance was made on the plaintiff's behalf: that the "Laidmans" sailed from Calcutta for the Mauritius in October 1851, and that on the voyage 113 bags were jettisoned, being thrown into the sea to save the ship in consequence of stress of weather: that on the arrival of the ship at Mauritius, 49 bags were thrown into the sea as unfit for consumption by the authority of the Governor of the Mauritius, according to the regulations there in force: that the "Margaret Skelly" sailed from Calcutta for the Mauritius in October 1851: that on the voyage 47 bags were jettisoned, being thrown into the sea to save the ship: that the ship was so damaged by a storm as to be forced to put back to Calcutta, and 3,423 of the said bags of rice were so injured, that if sent on to the Mauritius they would on their arrival have been of less value than the freight and charges, and were sold at Calcutta for the benefit of the insurers.—Breach: That though the defendant paid so much of the claim as relates to the bags jettisoned, yet that they had not paid the remainder.

Pleas.—First, setting out the policy of insurance, which was in the usual printed form, and the material parts of which were as follows:—"At and from Calcutta to Mauritius including *craft risk to and from the vessel*, upon any kind of goods, merchandize, &c., of and in the good ship or vessel called *ship or ships* whereof is master, &c.: the said ship, &c., goods and merchandize, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at *on rice to be declared, warranted free of particular average unless the vessel be stranded, sunk or burnt*. Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage; they are of the seas, men of war, fire, enemies, pirates,

rovers, thieves, jettisons, &c. (concluding with the usual memorandum): N.B. Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general or the ship be stranded.—Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under 5 per cent., and all other goods, also the ship and freight are warranted free from average under 3 per cent., unless general or the ship be stranded.”—(The plea then set out the declaration indorsed on the policy, which was as follows):—

R	500 bags rice, per “Laidmans,” @ 8/3 per bag . . . £206 5s.	
R	4,500 bags rice, per “Margaret Skelly,” @ 8/3 . . . £1,856 5s.	£2,062 10
		<hr/> £1,937 10

The plea then alleged that, as to the 49 bags of rice, by the “Laidmans,” alleged to have been so damaged as to be thrown into the sea at the Mauritius, a large portion of the 500 bags shipped on board the “Laidmans” were not lost by the perils insured against, but were safely discharged and landed at the Mauritius and were delivered to the persons interested, and that the “Laidmans” was not stranded, sunk or burnt.

Secondly, as to the 3,423 bags: that the policy and indorsement were in the words mentioned in the first plea; and that a large part of the 4,500 bags shipped on board the “Margaret Skelly” were not lost by the perils insured against, and were safely discharged and landed at the Mauritius, and that the “Margaret Skelly” was not stranded, sunk or burnt.

Demurrer to each plea and joinder thereon.

Wilde (with whom was *Smythies*), for the plaintiff.—The question is whether the policy must not be construed *divisè*; in other words, whether the assured is not entitled

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to recover the value of so many bags as have been totally lost. In *Ralli v. Janson* (a), it was decided that where a person insures goods in separate packages generally, and there is no distinct valuation of the packages, if some of them are lost, the memorandum that the goods are warranted free from average, unless general, exempts the underwriters from liability as for a total loss of part. The Court did not decide the point here raised. *Jervis*, C. J., in delivering judgment, said:—"The fact of the cargo being in bags only renders it more practicable to value and insure each bagful separately: but in the absence of a separate valuation, or other similar expression, to indicate an intention to insure each package severally as well as the whole jointly, it does not of itself show that the policy, which is in terms upon the whole, was intended to apply severally to each particular bag, any more than it would apply to each separate particle of a cargo loaded in bulk." Here the policy has been framed with the view that the goods should be separable; they are marked and numbered, and valued at so much per bag. Policies on goods "in ship or ships, the goods to be declared" are mere outline contracts to be completed by the declaration of interest. If the policy had been on produce, and the insured had declared goods of different sorts, as rice, indigo and sugar, or if several sorts of rice, as Necrensie, Patna, or Larong, had been declared, they would have been separate risks: *Duff v. Mackenzie* (b). It is clear that the assured might have declared any number of ships, and might therefore have created any number of risks. In *Lewis v. Rucker* (c) the sugar was valued at 30*l.* per hoghead; and that case was referred to by the Court in *Ralli v. Janson* as one in which there was a separate insur-

(a) 6 E. & B. 422.

Insurance, 74.

(b) 26 L. J., N. S., C. P.

(c) 2 Burr. 1167.

313; see also 1 Magens on

ance on each parcel. So in *Navone v. Haddon* (a), where each bale of silk was separately valued, the defendant's counsel contended that the insurance was on the whole 81 bales, and that as all but twenty-three had reached their destination there could be no total loss; but *Williams, J.*, at *Nisi prius*, overruled the objection, and directed the jury that the insurance was to be taken as upon each bale. In 1 *Magens on Insurance*, p. 74, it is said,—“If a person ships 1000 pieces of long cloth, divided into 50 bales of 20 pieces, each piece worth 1*l.*, he may say 1000*l.* on 50 bales at 20*l.* per bale; and then (under the ordinary memorandum) the insurer will be liable for 3*l.* per cent. damage on each bale.” Here the only valuation is 8*s.* 3*d.* per bag. In 2 *Phillips on Insurance*, sect. 1773, it is said,—“Where an insurance free from average is made indiscriminately upon an article, *without* any provision in the policy indicating that a loss is to be adjusted on the different bales, or packages, or parcels, separately, the assured cannot recover for a total loss on account of the destruction of a part of the insured shipment of articles of the same description.”

Bovill (with whom was *Blackburn*), for the defendant.—The contract is contained in the policy, and the memorandum cannot alter it. It is not alleged that there was any new contract. The declaration might have been by word of mouth, though it is usual to indorse it on the policy, and for the underwriter to initial it, to shew that he has had notice of it: *Harman v. Kingston* (b). The declaration of interest is said to be in the nature of a new contract; but that position was denied by Lord *Ellenborough* in *Robinson v. Touray* (c), where it was said to be

(a) 9 C. B. 30, 34. Explained in note 6 E. & B. 438.

(b) 3 Camp. 150.

(c) 3 Camp. 158. See S. C. 1 M. & Sel. 217.

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the mere exercise of a power conferred upon the assured. Here the underwriter only entered into a policy "on rice" to be declared in "ship or ships." Two things were to be declared, the rice and the ship or ships. Whatever rice, and whatever ships were declared were to be free from particular average. It is common to insure thus: "1000 bags, each 20 to be free from average" (a); but where there is no such stipulation, can it be said, that if a cargo of oranges had been insured, the assured could have declared the value of, and thereby created a separate insurance upon each orange? There is a power to make separate insurances on the several ships on board which the rice may be loaded, but not to make separate insurances on separate bags of rice on board the same ship.

Wilde, in reply.—Here, nothing is insured on the face of the policy. That which is to be the subject of the insurance, is to be ascertained by the declaration of interest. [*Pollock*, C. B.—The declaration is so far part of the policy that the contract cannot be complete while something remains to be done. But the declaration of interest must be consistent with the policy. It is not consistent with the terms of this policy to split the insurance into an insurance on separate parcels of goods in the same ship.]

POLLOCK, C. B.—We are all of opinion that the defendant is entitled to judgment. The question is, whether on a policy "on rice to be declared, warranted free of particular average," the insured can declare so as to make each parcel free from average. I adopt the argument of *Mr. Bovill*, that what is to be declared is the value of the rice in bulk.

(a) *Hagedorn v. Whitmore*, 1 Stark. 157, was referred to as a case where, by the terms of the policy, the underwriters were

bound to pay average separately on each particular marked package.

If the policy were not so construed, there would be nothing to prevent the average clause from being frittered away to nothing, for if the cargo was fruit, the value of each orange might be declared. When, therefore, there is an insurance on rice to be valued, the policy does not give the insured power to declare it in separate parcels, so as to make the average clause apply separately to each.

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BRAMWELL, B.—I am of the same opinion. The policy is an insurance “on rice to be declared in ship or ships”: this however is subject to the clause, that the rice is to be free from particular average. The question is, what *may* be declared? To that I answer, that which *must* be declared and no more. What then is necessary to be determined by the declaration? Where the policy is on a particular ship for a particular voyage, and the value of the goods has not been mentioned in the policy, but they are to be valued, the value must be declared. If the ship is not named, the ship must be declared. Here it was necessary to name the ship or ships, to state the value of, and something to identify the articles insured. The insurer had no right to do more. If an insurer has a right to send goods in several ships, and does so, there are inevitably several risks and several insurances; but if they are in one ship, it is not inevitable that there should be several risks in one ship; and the insurer cannot subject the underwriters to a risk which they have not agreed to undertake. It is possible, that under this policy the shipper might make several risks of different sorts of rice; how that may be I do not say. But if, by the declaration in the present case, the insurer meant to declare a separate insurance on each bag, he put an obligation on the underwriters which they never contemplated. I read the policy as meaning, that as to all the goods in each ship they should be free of particular average. I doubt too whether, if this declaration had been inserted in the body of the policy,

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it could be construed as any thing more than a mode of shewing how the value was calculated.

WATSON, B.—This is a policy “on rice to be declared, warranted free of particular average.” Neither the rice, nor the value, nor the ship, is defined. The insured may declare any thing within the terms of the policy. The cargo was rice in bags. Since the case of *Ralli v. Janson* (a), it is clear that any destruction of part of such a cargo is not a total loss of part, but a partial loss of the whole. The underwriter took care to insert a warranty, to be free from particular average. Then comes the indorsement. I am far from saying that if it was inserted in the policy the insurance would have been on each bag. But we will assume that it would have been so. It is said that the indorsement was initialed by the underwriters. But the indorsement is a declaration by the insured ascertaining the subject of the insurance. The initials merely acknowledge the receipt of the notice, and identify it as a declaration by the insured. The policy remains in hands of the insured. The declaration cannot extend the contract or make it a fresh policy. It is said that, if there were different kinds of rice, they might be separately declared under a policy like the present; but however that may be I think it would be safer for the insured to provide for such a case in the policy.

CHANNELL, B.—I agree that the defendant is entitled to judgment. It is unnecessary to determine what the effect of the words would have been if they were in the policy. Here they do not create a separate insurance on each bag of rice. At the time of the making of the policy certain particulars were agreed upon, others were left to be settled. The policy was to be on rice to be warranted free

(a) 6 E. & B. 422.

from particular average, to be sent in ship or ships. Something more was wanting to make a binding contract. The parties can only fill up such particulars as were left in blank, so as to be consistent with the policy. But the words relied on supply particulars not consistent with the policy, not filling up any blank in the policy, but inconsistent with the terms of it.

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Judgment for the defendant.

EX PARTE THE GREAT WESTERN RAILWAY COMPANY.

Nov. 23.

THIS was an application for a writ of certiorari to remove a cause of *Williams v. The Great Western Railway Company* from the County Court of Gloucestershire into this Court.

It appeared from the affidavits, that a bull, the property of the plaintiff, had strayed from the field of the plaintiff into an adjoining field, and from thence jumped over a five barred gate, which was locked, upon the line of the defendants' railway, where it met another bull belonging to a person named Dowding. The two bulls fought, and while they were fighting a train came up and killed both. The plaintiff claimed 32*l.* as the value of his bull. The plaintiff had served a notice that he required a jury for the trial of the cause. The defendants' attorney swore that a question of law, under the Railway Clauses Consolidation Act, 1845, would arise, and that he believed that a jury of farmers in the neighbourhood would not be an impartial tribunal. *Martin, B.*, at Chambers, had refused to make an order, except upon the terms that, if the defendants succeeded, the plaintiff should not pay more costs than if the case had been tried in the County Court. The defendants

On an application by a defendant for a certiorari to remove from a County Court a cause in which the demand is over 20*l.*, the Court does not make it a condition that the defendant, if successful, shall have no more costs than would have been allowed in the County Court.

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being unwilling to accept the order on those terms, the learned Judge desired that the matter should be mentioned to the Court.

Phipson, in support of the application.—The defendants are entitled to a writ of certiorari without such conditions as those sought to be imposed. The 9 & 10 Vict. c. 95, s. 90, provides that “no plaint, entered in any Court holden under this Act, shall be removed or removable from the said Court into any of Her Majesty’s Superior Courts of Record, by any writ or process, unless the debt or damage claimed shall exceed 5*l.*, and then only by leave of a Judge of one of the superior Courts, in cases which shall appear to the Judge fit to be tried in one of the superior Courts, and upon such terms as to payment of costs, giving security for debt or costs or such other terms as he shall think fit.” [*Bramwell*, B.—The question here is, whether the case is one which ought to be tried by a superior Court? If not, the cause ought not to be removed at all. If the case is one fit to be tried here, why should terms be imposed upon the defendants?] *Symonds v. Dimsdale* (a) shews that the right of the subject to the writ is not taken away by the concluding words of this section.

POLLOCK, C. B.—We are all of opinion that this rule must be absolute, without conditions. The claim is for a sum over 20*l.* If the case had been one in which the superior Courts had not a concurrent jurisdiction, the terms proposed by my brother *Martin* would have been reasonable. In such a case, if a defendant wishes to have his case tried in a superior Court, it is reasonable that he should bear the extra expence. But it is otherwise in cases where the superior Courts have a concurrent jurisdiction.

Rule absolute accordingly (b).

(a) 2 Exch. 533.

(b) See 19 & 20 Vict. c. 108, ss. 38, 39, 42.

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ATTENBOROUGH v. THOMPSON.

Nov. 21.

IN this case the sheriff of Middlesex having seized the defendant's goods under a fi. fa. issued on a judgment obtained by the plaintiff, one Maxwell claimed the goods under a bill of sale from the defendant. In the affidavit filed with a copy of the bill of sale, in pursuance of the 17 & 18 Vict. c. 36, s. 1, the attesting witness was described as "Thomas Myles Attwell, clerk to Messrs. Moores & Sills, attornies, of No. 18, Old Broad Street, in the city of London, gentlemen." The sheriff took out an interpleader summons which was heard before *Martin, B.*, when it appeared that Attwell, the attesting witness, attended every day at No. 18, Old Broad Street, which was the office or place of business of his employers, but that he slept elsewhere. It was objected that the affidavit did not contain a sufficient description of the *residence* of the attesting witness within the meaning of the statute; and by consent of the parties the learned Judge ordered that the sheriff withdraw from possession of the goods seized; the plaintiff to be at liberty to take the opinion of the Court upon the point.

Under the 17 & 18 Vict. c. 36, s. 1, which requires to be filed an affidavit of the description of the *residence* of every attesting witness to a bill of sale, it is a sufficient compliance with the statute if an attorney's clerk is described as of the office or place of business of his employers though he sleeps elsewhere.

8 & 13 541.

Day, in the present term, obtained a rule calling on the claimant to shew cause why the sheriff should not re-enter and retake possession of the goods seized by him.

Phipson shewed cause (Nov. 17).—The 17 & 18 Vict. c. 36, s. 1, enacts that every bill of sale, &c., shall, "together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same," &c.; "and

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of every attesting witness to such bill of sale," be filed within twenty-one days. Here there is a sufficient description of the *residence* of the attesting witness within the meaning of that enactment. By a rule of the Court of King's Bench, M. T. 15 Car. 2, it was ordered that the true place of *abode*, and the true addition of every person who shall make affidavit in Court, shall be inserted in such affidavit; and in *Haslope v. Thorne* (a), it was held a clerk might state his place of abode to be the office where he was employed the greater part of the day, though at night he slept at another place. Lord *Ellenborough* there said,—“That the words ‘place of abode’ did not necessarily mean the place where the deponent sleeps; that the object of the rule of Court was to ascertain the place where the deponent was most usually to be found, which in the present case was the office at which he was employed during the greater part of the day, and not the place whither he retired merely for the purposes of rest. It is the settled form of almost all the affidavits swearing to service.” *Alexander v. Milton* (b) is an authority to the same effect. Under the 2 & 3 Wm. 4, c. 39, s. 12, which requires an indorsement on all process of the “place of abode” of the attorney suing out the same, it has been held that an indorsement of the place of business is sufficient: *Engleheart v. Eyre* (c). It would be productive of great inconvenience, if a party who attended all day at an office in London but slept some miles distant, was obliged to describe himself as of the latter place. [*Pollock*, C. B.—A word of doubtful import like “residence” may be used for some purposes in one sense, and for others in another sense, but when a construction has been put upon it for a particular purpose, that ought to be adhered to.] The Reg. Gen. Trin. T., 1 Wm. 4, c. 2, requires that every notice of bail shall “mention the street or place and

(a) 1 M. & Sel. 103.

(b) 1 Dow. P. C. 570.

(c) 2 Dow. P. C. 145.

number (if any) where each of the bail *resides*; and according to *Tanner v. Nash* (a), the place of business of the bail is a sufficient description of their residence. There is no substantial difference between the words "abode" and "residence:" in Richardson's Dictionary, and also in Walker's, they are defined as synonymous terms. In a case of *England v. Blackwell, Erle, J.*, put this construction on the 17 & 18 Vict. c. 36, s. 1, and the question is now pending in the Court of Queen's Bench (b).—He also referred to *Taylor v. The Crowland Gas Company* (c).

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Lush, in support of the rule.—Looking at the object of the Act, the word "residence" is not satisfied by a description of the "place of business." The residence of the party giving the bill of sale is also required to be stated; and the evident intention was that he should be described of the place where he dwells. The Court of King's Bench put their own construction on their rule of M. T. 15 Car. 2, and said that by "place of abode," they did not mean the place where the deponent slept, but where he was most usually to be found. So with regard to the indorsement on process of the *abode* of the attorney, the object was to enable the party sued to find the attorney and pay him the debt; and therefore the word "abode" is satisfied by the "place of business" of the attorney. The County Court Act, 9 & 10 Vict. c. 95, s. 128, makes a marked distinction between the place where a defendant "dwells" and "carries on his business." In the case of the person giving the bill of sale, the object of the provision is to let his creditors know what goods are assigned; but that object would be defeated if a person assigning the furniture of his residence in the country was described as residing at an office in London.

(a) 1 Price, 400.

(b) See *post*, p. 563, note.

(c) 11 Exch. 1.

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The word "residence" is used in other statutes and has received the construction now contended for. By the 3 & 4 Wm. 4, c. 42, s. 8, no plea in abatement for the non-joinder of a co-defendant shall be allowed, unless verified by an affidavit stating his "place of residence;" and in *Maybury v. Mudie* (a), it was held that the statute was not satisfied by a statement of his place of business." So in *Lambe v. Smythe* (b), it was held that the "residence" mentioned in that statute means the domicile or *home* of the party. The 9 & 10 Vict. c. 66, s. 1, provides that no person shall be removed from any parish in which he shall have *resided* for five years; but could it be said that a clerk who had been five years at a place of business was irremovable under that statute. The term "residence" also occurs in the Reform Act, 2 Wm. 4, c. 45, s. 32, and has been held to mean where a party *bonâ fide* dwells: *Withorn, Appt., Thomas, Resp.* (c). In *Rex v. The Inhabitants of North Curry* (d), *Bayley, J.*, speaking of the word "resides," said:—"I take it that that word, where there is nothing to shew that it is used in a more extensive sense, denotes the place where an individual eats, drinks, and sleeps; or where his family or his servants eat, drink, and sleep." The requisitions of the 17 & 18 Vict. c. 36, must be strictly complied with: *Allen v. Thompson* (e), *Hatton v. English* (f).

Cur. adv. vult.

POLLOCK, C. B., now said.—We are of opinion that this rule should be discharged. We delayed giving judgment, because we understood that the same point was raised in the Court of Queen's Bench, and we were desirous to avoid any difference of opinion between the two Courts. The

(a) 5 C. B. 283.

(b) 15 M. & W. 433.

(c) 8 Scott, N. R. 783.

(d) 4 B. & C. 953.

(e) 1 H. & N. 15.

(f) 7 E. & B. 94.

Court of Queen's Bench have considered (a) that the purposes of this Act would be better answered by construing the word "residence" to mean, not the place where a person sleeps but the place where he is chiefly to be found, which in the present case was the place where his employers carried on their business. The Court of Queen's Bench having put that construction on the Act, we think our decision ought to be in accordance with theirs, and the rule therefore will be discharged. On hearing the argument I had myself arrived at a similar conclusion. It is true, there may be occasions when we ought to construe the word "residence" as meaning the place where a man sleeps, but the word does not necessarily have that meaning. The object of the enactment was that information should be given where the witness was to be found, in order that he might answer any inquiries respecting the bill of sale. I must guard against being supposed to decide that the place where a person sleeps would not suffice, it is enough for the present purpose to say that the description in this case is sufficient.

BRAMWELL, B.—I am also of opinion that the rule ought to be discharged. No doubt, in ordinary conversation, the word "residence" means the place where a man resides; but for certain purposes the word "abide" has received a construction different from its usual meaning, and the question is whether we ought not for similar reasons to put the same construction on the word "residence" in this act of parliament. I am not altogether satisfied with the reasoning, but I think that this is a case in which the plain meaning of the word may be varied.

WATSON, B., and CHANNELL, B., concurred.

Rule discharged.

(a) The Court of Queen's Bench delivered their judgment in the present term (Nov. 20). *See 8 E.D. 541.*

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Nov. 25.

BOULTON v. JONES and Another.

The defendants, who had been in the habit of dealing with B., sent a written order for goods directed to B. The plaintiff, who on the same day had bought B.'s business, executed the order without giving the defendants any notice that the goods were not supplied by B. — *Held*, that the plaintiff could not maintain an action for the price of the goods against the defendants.

ACTION for goods sold. Plea.—Never indebted.

At the trial before the Assessor of the Court of Passage at Liverpool, it appeared that the plaintiff had been foreman and manager to one Brocklehurst, a pipe hose manufacturer, with whom the defendants had been in the habit of dealing, and with whom they had a running account. On the morning of the 13th January, 1857, the plaintiff bought Brocklehurst's stock, fixtures, and business, and paid for them. In the afternoon of the same day, the defendant's servant brought a written order, addressed to Brocklehurst, for three 50-feet leather hose 2½ in. The goods were supplied by the plaintiff. The plaintiff's book keeper struck out the name of Brocklehurst and inserted the name of the plaintiff in the order. An invoice was afterwards sent in by the plaintiff to the defendants, who said they knew nothing of him. Upon these facts, the jury, under direction of the Assessor, found a verdict for the plaintiff, and leave was reserved to the defendants to move to enter a verdict for them.

Mellish having obtained a rule nisi accordingly,

M^cOubrey, now shewed cause.—It is not denied by the defendants that the goods, for the price of which this action is brought, were the goods of the plaintiff. No one but the plaintiff could have sued for the price of them. By keeping the goods after notice that the plaintiff was the owner, the defendants must be taken to have adopted the contract with him. *Bickerton v. Burrell* (a) turned on the point that notice had not been given, before action brought, that the plaintiff was the party really interested. In that case the plaintiff represented himself as agent for another

(a) 5 M. & Sel. 383.

person. In *Humble v. Hunter* (a) the plaintiff had allowed her son to represent himself as owner. Here the defendant may have known of the change of name in the orders. In *Rayner v. Grote* (b) the plaintiff had represented himself to be merely the agent, but, being really the principal, he was held entitled to maintain the action.—He referred also to *Skinner v. Stocks* (c).

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Mellish, in support of the rule.—This is not a case of principal and agent. In *Rayner v. Grote* (b) there was evidence that, at the time of the delivery of the first parcel of the goods, the defendant had notice that the plaintiff was the principal. [*Martin*, B.—Here there was some evidence of acceptance, the invoice was sent in and the goods were not returned.] They may have been destroyed, and, in fact, were probably used at the time they were ordered. No set-off could be pleaded to the present action in respect of any debt which might be due from Brocklehurst to the defendant: *Isberg v. Bowden* (d). The question is not to whom the goods belonged, but with whom the contract was made. *Humble v. Hunter* (a) and *Bickerton v. Burrell* (e) are authorities in favour of the defendants.

POLLOCK, C. B. — The point raised is, whether the facts proved did not shew an intention on the part of the defendants to deal with Brocklehurst. The plaintiff, who succeeded Brocklehurst in business, executed the order without any intimation of the change that had taken place, and brought this action to recover the price of the goods supplied. It is a rule of law, that if a person intends to contract with A., B. cannot give himself any right under it. Here the order in writing was given to

(a) 12 Q. B. 310.

(b) 15 M. & W. 359.

(c) 4 B. & Ald. 437.

(d) 8 Exch. 852.

(e) 5 M. & Sel. 383.

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Brocklehurst. Possibly Brocklehurst might have adopted the act of the plaintiff in supplying the goods, and maintained an action for their price. But since the plaintiff has chosen to sue, the only course the defendants could take was to plead that there was no contract with him.

MARTIN, B.—I am of the same opinion. This is not a case of principal and agent. If there was any contract at all, it was not with the plaintiff. If a man goes to a shop and makes a contract, intending it to be with one particular person, no other person can convert that into a contract with him.

BRAMWELL, B.—The admitted facts are, that the defendants sent to a shop an order for goods, supposing they were dealing with Brocklehurst. The plaintiff, who supplied the goods, did not undeceive them. If the plaintiff were now at liberty to sue the defendants, they would be deprived of their right of set-off as against Brocklehurst. When a contract is made, in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book, or the like, or where there might be a set-off, no other person can interpose and adopt the contract. As to the difficulty that the defendants need not pay anybody, I do not see why they should, unless they have made a contract either express or implied. I decide the case on the ground that the defendants did not know that the plaintiff was the person who supplied the goods, and that allowing the plaintiff to treat the contract as made with him would be a prejudice to the defendants.

CHANNELL, B.—In order to entitle the plaintiff to recover he must shew that there was a contract with himself. The order was given to the plaintiff's predecessor in business. The plaintiff executes it without notifying to the defendants

who it was who executed the order. When the invoice was delivered in the name of the plaintiff, it may be that the defendants were not in a situation to return the goods.

Rule absolute.

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RIDD v. BETTY MOGGRIDGE, Executrix of WILLIAM
MOGGRIDGE.

Nov. 18.

DECLARATION on a promissory note made by William Moggridge, the defendant's testator, for 30*l.* with interest at the rate of 4 per cent. per annum, payable on demand.

Plea.—That the cause of action did not accrue within six years before suit.

Replication.—That the promissory note was made by the said William Moggridge jointly with one Thomas Perkins, and that within the period of six years next before this suit, and in the lifetime of William Moggridge, Thomas Perkins paid the plaintiff interest upon the said promissory note.

Rejoinder.—That the following is a copy of the said note and the signatures thereto:—"February 1st, 1849. I promise to pay unto Mary Red, younger, of Burn Street, or order, on demand, the sum of 30*l.*, with interest at the rate of 4 per cent. per annum, value received. As witness my hand this 1st day of February, 1849. Thomas Perkins, William Moggridge." And the defendant says that the said William Moggridge made and signed the said note only as a surety for Thomas Perkins, and did not himself receive any value or consideration, or benefit, for making or signing the same, and did not, at any time, authorize the said Thomas Perkins to pay, nor did the said Thomas Perkins pay, any of the said interest on behalf of him the said William Moggridge.

Demurrer and joinder.

To a plea of the Statute of Limitations in an action on a promissory note, the plaintiff replied that the note was made by the defendant jointly with one T. P., and that within six years before suit T. P. paid the plaintiff interest on the note.—*Held*, that, assuming the payment to have been made before the passing of 19 & 20 Vict. c. 97, the replication was bad on general demurrer.

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Phipson, in support of the demurrer.—The rejoinder is bad. The note is a joint and several note: *March v. Ward* (a), *Clerk v. Blackstock* (b), *Regina v. Silkstone* (per *Wightman, J.*) (c), *Sayer v. Chaytor* (d), and *Byles on Bills*, p. 6. [*Pollock, C. B.*—Can the note be treated as both joint and several? Looking at the grammatical construction, it would appear to be the several note of each.] Payment by a joint maker takes the case out of the statute: *Burleigh v. Stott* (e), *Wyatt v. Hodson* (f), *Channell v. Ditchburn* (g). As against the defendant, the payment must be taken to have been before the passing of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97. No time being stated in the rejoinder, it must be taken most strongly against the defendant. [*Bramwell, B.*—The defendant has a right to say the same as to the replication.] —[The Court suggested that the case should stand over, and the pleadings be amended by alleging when the payment did take place.]

Aspland, for the defendant.—There is another objection to the replication; it is bad as only stating evidence from which a promise may or may not be inferred. Part payment does not necessarily take a debt out of the statute: *Waugh v. Cope* (h). [*Watson, B.*, referred to *Wainman v. Kynman* (i). *Pollock, C. B.*—If the part payment is made under circumstances which shew that it is an acknowledgment that more is due, a promise may be presumed, but it is necessary that the circumstances should be submitted to the jury.] Part payment does not operate as a bar to the Statute of Limitations as a matter of law, and accordingly

(a) 1 Peake N. P. C. 130.
Pollock, C. B., pointed out that this case is no authority.
 (b) *Holt's N. P. C.* 474.
 (c) 2 Q. B. 525.
 (d) 1 Lutw. 695.

(e) 8 B. & C. 36.
 (f) 8 Bing. 309.
 (g) 5 M. & W. 494.
 (h) 6 M. & W. 824.
 (i) 1 Exch. 118.

in *Hollis v. Palmer* (a), where the payment of interest was alleged in the declaration, for the purpose of taking a case out of the statute, it was held that the declaration disclosed only evidence of a cause of action, and not any actual cause of action that was not barred by a plea of the Statute of Limitations in the usual form. [*Bramwell*, B.—If this case had arisen shortly after the passing of the 21 Jac. 1, c. 16, s. 3, payment would have been held an insufficient answer. However, the Courts first held that a new promise might be a fresh cause of action within the six years; then that an acknowledgment or payment might be sufficient as evidence from which a promise might be implied. But nothing is sufficient unless a fresh promise is inferred, and that inference we cannot draw.]

Per CURLIAM.—The replication is clearly insufficient. The plaintiff had better amend by taking issue on the plea.

Leave to amend accordingly, otherwise judgment for the defendants.

(a) 2 Bing. N. C. 713.

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BARNES v. BRAITHWAITE AND NIXON.

Nov. 4.

DECLARATION for money had and received.—Plea: Never indebted.

At the trial, before *Pollock*, C. B., at the London sittings after last Trinity Term, the following facts were admitted—The plaintiff having brought an action against one Hayward, the cause was referred to the defendants, who were civil engineers. The defendants proceeded with the reference, which resulted in an award in favour of the plaintiff for 108*l*. The plaintiff in order to take up the award was compelled to pay to the defendants 436*l*. 0*s*. 9*d*. The Master, on taxation of the plaintiff's costs of the reference and award, ultimately struck off from the arbitra-

Where a party to an arbitration is compelled to pay to a lay arbitrator an exorbitant sum in order to take up the award, he may maintain an action for money had and received to recover the excess beyond what is a proper remuneration for the arbitrator's services.

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tors' fees the sum of 239*l.* (a); and for this sum the present action was brought, the defendants having refused to refund the amount. The defendants' counsel objected that, under the circumstances above stated, no action would lie against the arbitrators. The learned Judge directed a verdict for the plaintiff with liberty to the defendants to move to enter a verdict for them, if the Court should be of opinion that the action was not maintainable.

Lush now moved accordingly, and contended that the action would not lie.

WATSON, B.—This Court, in the case of *Re Coombs* (b), intimated a strong opinion that under such circumstances an action was maintainable; and in *Fernley v. Branson* (c), a County Court Appeal, heard before *Wightman, J.*, and *Erle, J.*, that doctrine was acted upon.

Lush requested time to consider the cases, and afterwards admitted that he was not entitled to a rule.

Rule refused.

(a) See *Barnes v. Hayward*, 1 H. & N. 742. (b) 4 Exch. 839. (c) 20 L. J. Q. B. 178.

Nov. 20.

DAVIES v. UNDERWOOD.

COVENANT.—The declaration stated that on the 25th of April, 1842, by indenture between the plaintiff and defendant, the plaintiff let to the defendant a piece of The defendant, an under-lessee, who had covenanted with the plaintiff, his lessor, to keep, and at the expiration or sooner determination of the term, to leave and deliver up the premises in repair, allowed them to become out of repair. While they remained in this condition, the plaintiff having committed a forfeiture by nonpayment of rent, the superior landlord brought ejectment, and evicted the plaintiff and defendant.—*Held*, that the plaintiff was entitled to recover against the defendant substantial damages for the nonrepair of the premises.

ground with the messuage thereon erected, &c., to hold for 21 years from Lady Day 1842; and that the defendant covenanted with the plaintiff that the defendant, his executors, &c., would at his and their own costs and charges, from time to time and at all times during the term, well and sufficiently uphold, support, sustain, &c., amend and keep in good order and condition the messuage, &c., with all proper reparations, &c.; and the said premises being in all things well and sufficiently repaired, upheld, supported, &c., should, and would at the end or other sooner determination of the term thereby granted, peaceably and quietly leave surrender and yield up to the plaintiff his executors, &c.—Averment: that defendant entered and was possessed for the term.—Breach: that the defendant did not during the term well and sufficiently repair, &c.; but permitted the demised premises to become ruinous, &c., for want of needful repair.

Pleas.—First, that the defendant did repair.—Secondly, that after the making of the indenture and before the breaches, one Arthur Wells, who was entitled as against the plaintiff and defendant to the possession of the premises, by reason of certain breaches by the plaintiff of certain covenants entered into by him before the making of the said indenture, in a certain lease under which the plaintiff held the premises, commenced an action of ejectment against the plaintiff and one Paxon, for the recovery thereof in the Court of Queen's Bench: that it was adjudged that A. Wells should recover possession, &c., that thereupon, before the breaches of covenant in the declaration mentioned, A. Wells caused a writ of habere facias possessionem to issue, &c., which was delivered to the sheriff, &c.; and under and by virtue of which writ possession of the said premises was given by the sheriff to A. Wells, and the defendant and the plaintiff were evicted,

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&c.; and the possession and all the estate, &c., of the plaintiff and of the defendant in the premises thereby ended and determined.

The plaintiff replied, taking issue on the pleas; and also new assigned breaches of covenant before the determination of the term.

The defendant traversed the breaches mentioned in the new assignment.—Whereupon issue was joined.

At the trial, before *Pollock*, C. B., at the London sittings after last Trinity Term, it appeared that in May, 1839, one Filor demised the premises in question to the plaintiff for 72 years at the yearly rent of 42*l.* 10*s.* In 1842 the plaintiff demised the same premises to the defendant for 21 years at the yearly rent of 50*l.*, subject to the covenants mentioned in the declaration. In 1848 the defendant assigned to one Parker, who in the same year assigned to Paxon. In March, 1855, the rent being in arrear, Wells, in whom Filor's interest as reversioner under the lease of 1839 had become vested, brought an action of ejectment against the plaintiff and Paxon the tenant in possession, for nonpayment of rent under the lease of 1839. At this time the premises were in a bad state of repair. Upon these facts the learned Judge directed a verdict for the plaintiff with nominal damages, giving him leave to move to enter a verdict for an agreed sum of 40*l.*, if the Court should be of opinion that he was entitled to substantial damages.

Petersdorff having obtained a rule nisi accordingly.

Overend and *Dowdeswell* now shewed cause.—It is not disputed that, where there is a *continuing* reversion, the reversioner may, at any time during the term, sue for the breach of a covenant to repair, and the damages will be the diminution in value of the reversion. In *Clow v. Brog-*

den (a), the term was determined partly at least by the act of the defendants. In the present case the reversion was destroyed by the act of the plaintiffs. The diminution in value of the reversion is the real measure of damages: *Smith v. Peat* (b), *Turner v. Lamb* (c). The reversion could not have been sold for anything at all, the lease having been avoided by reason of the breach of other covenants to which the defendant was no party. It is as if the premises had been built on a cliff which fell into the sea. [*Channell*, B.—Suppose A. lets premises to B. who lets them at an improved rent, if his tenant allows the premises to be out of repair, B. may choose rather to forfeit his interest than pay his rent and go to the expense of repairing.] If the defendant had repaired and the term had not been forfeited, he would have had the benefit of the money laid out by him during the remainder of the term. The damage should have been specially stated in the declaration.—They also referred to *Marriott v. Cotton* (d), *Brierly v. Kendall* (e), *Hosking v. Phillips* (f).

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Petersdorff appeared to support the rule, but was not called upon.

POLLOCK, C. B.—We are all of opinion that the rule must be absolute. This case is distinguishable from the supposed case of the demised premises being destroyed by a convulsion of nature, as by falling into the sea or being swallowed up and lost, because there the original lessor could not maintain an action of covenant against his lessee, and therefore such lessee would have no right of action against his underlessee. That does not apply here, because the superior landlord has a right of action on the

(a) 2 Man. & G. 39.

(b) 9 Exch. 161.

(c) 14 M. & W. 412.

(d) 2 C. & K. 553.

(e) 17 Q. B. 937.

(f) 3 Exch. 168.

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covenant to leave and deliver up in repair, as well as a remedy by ejectment. And as the intermediate landlord is liable to make good the defects in the premises, he may indemnify himself by this action beforehand.

BRAMWELL, B.—It is said that the plaintiff is not entitled to recover substantial damages. It would be very remarkable if he could not. Then it is said that the special damage should be stated in the declaration; but that could not have been done since it arises from the nonperformance of the plaintiff's covenant which is not identical with that of the defendant. The criterion of damage mentioned by Mr. *Overend* is a very good test, but not the only test of the damages to be recovered. Then a case was suggested of a man being under a covenant to repair a house, but not to rebuild it if it should be burnt down. If in such a case the house should be burnt down when out of repair, I should say that no action could be maintained by the lessor on the covenant to repair, because he would have sustained no damage. Here, however, the premises when delivered up to the ground landlord were worth 40*l.* less than they would have been if in proper repair.

WATSON, B.—I am of the same opinion. The great object of a covenant of this sort is not to put money into the pockets of a lessor, but to enforce the performance of the acts stipulated for. The damages recovered are usually such as are sufficient to put the premises into repair. As a matter of fact, it is never proved in evidence to what extent the reversion is damaged. The entry for nonpayment of rent does not affect the case in any way.

CHANNELL, B., concurred.

Rule absolute.

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Nov. 19.

THE first count of the declaration stated, that the defendants were common carriers of goods for hire from London to Brecon in South Wales, and the plaintiffs delivered to the defendants as such common carriers, at London, and they received of the plaintiffs as such carriers a puncheon containing gin of the plaintiffs, to be carried by the defendants from London to Brecon and there to be delivered by them for the plaintiffs, for hire: Yet the defendants, although a reasonable time for that purpose had elapsed, had not yet delivered the goods aforesaid for the plaintiffs at Brecon, and in fact by their carelessness and negligence, while the goods were in their possession for the purpose aforesaid, a great part of the gin in the said puncheon became and was lost to the plaintiffs.—The third count stated, that in consideration that the plaintiffs, at the defendants' request, delivered to them certain goods of the plaintiffs to be carried by the defendants from London to Brecon, and there to be delivered by the defendants to one Thomas Webb for the plaintiffs, for hire, the defendants promised the plaintiffs that in case the said Thomas Webb should refuse to receive the said goods, whereby the same should remain undelivered, the defendants would give due notice of such refusal and non-delivery to the plaintiffs, and would take due and proper care of the said goods until such notice should have been given. And although the plaintiffs then delivered to the defendants, and they then received the said goods for the purpose aforesaid, and the defendants then accordingly carried the said goods to Brecon and there offered to the said Thomas

Where goods have been tendered by a carrier to a consignee and refused by him, there is no rule of law that the carrier must give notice of such refusal to the consignor: he is only bound to do what is reasonable.

Seemle, that whether the circumstances of the case make it reasonable that the carrier should give such notice, is a question for the jury.

A carrier is not responsible for leakage arising from an imperfection in the bung of a cask entrusted to him to be carried, and not caused by any negligence or omission on his part.

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Webb to deliver the said goods to him, and he refused to receive the same of the defendants whereby the same remained undelivered: Yet the defendants did not give due notice of such refusal or non-delivery to the plaintiffs, nor take due or proper care of the said goods until such notice was given, but made default therein; and by reason thereof a great part of the said goods became and was lost to the plaintiffs.

Pleas (inter alia) to first count.—First: Not guilty.

Thirdly: that the said part of the said goods in the first count mentioned was not, nor was any part thereof, lost to the plaintiffs by the carelessness or negligence of the defendants as in that count alleged.

To the third count.—That defendants did not promise as alleged.—Upon which issues were joined.

At the trial, before *Pollock*, C. B., at the London sittings after last Trinity Term, it appeared that in July 1854, the plaintiffs, who were wine and spirit merchants in London, received, through their traveller, an order for a small cask of gin from a customer named Webb, who kept an inn at Brecon in Wales. On the 27th July the plaintiffs delivered to the defendants, who were carriers, a puncheon of gin, containing 98 gallons, to be carried from London to Brecon, directed "Mr. Webb, George Inn, Brecon, Wales." The defendants carried the puncheon of gin to Newport, where they delivered it to the Moderator Boat Company, who conveyed it by canal to Brecon. The puncheon was tendered to Webb, the consignee, at Brecon, but he refused to receive it on the ground that it was a larger cask than he had ordered. The puncheon was then placed in the warehouse of one Morris, an agent of the Moderator Boat Company, where it remained until the following October, when the plaintiffs' traveller, again visiting Brecon, found that Webb had refused to receive it. On gauging the cask

it was found that, either from leakage or depredation, there was a deficiency of more than twenty-five gallons of gin. There was very little evidence as to the condition of the cask, or that the bung was secure at the time the cask was delivered to the defendants, or when it was tendered to Webb. But the cask was a new one, and it was shewn that the defendants were in the habit of rejecting packages tendered to them to be carried if in bad order. No notice was given to the plaintiffs that there was anything wrong about this cask. But a witness named Frost, a person in the employ of the Moderator Boat Company, stated, that when he received the puncheon from the defendants at Newport, to the best of his belief it was not full and was leaky, and that he had made the following entry respecting it in a book of the defendants; "Not full and leaky at the bung." The plaintiffs' counsel tendered evidence to prove that when goods are refused by the consignee, it is the usage of carriers to give notice thereof to the consignor, but the learned Judge having refused to receive the evidence, it was withdrawn.

It was submitted on behalf of the defendants, that under these circumstances, they were not responsible. The learned Judge told the jury that it was not the duty of a carrier, under all circumstances, to give notice to the consignor of the consignee's refusal to receive the goods, but that he was only bound to do what was reasonable; and his lordship left it to the jury to say whether what the defendants had done was reasonable, with reference to all the circumstances. His lordship also told the jury that the defendants were responsible for any loss which arose from their negligence between London and Brecon; that after the consignee had refused to receive the puncheon they were bound to put it in a place of safety, but that they were not responsible for any loss which occurred while the cask was in Morris's

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warehouse, if it arose from leakage; nor were they responsible for loss on the journey, if it arose from one of those incidents to which a cask is liable: that if the jury did not think it was made out to their satisfaction that the loss occurred while the cask was in the defendants' possession, they were not responsible. The jury having found a verdict for the defendants,

J. Brown, in the present term, obtained a rule nisi for a new trial on the grounds:—That the learned Judge rejected the evidence offered to prove a usage to give notice of the refusal of goods by the consignee: that the learned Judge should have directed the jury that it was the defendants' duty to give notice to the consignor of the consignee's refusal to receive the goods: that the learned Judge misdirected the jury in telling them that the defendants were not liable for leakage, during the transit, by accident, or unless the leakage arose from their negligence: that the learned Judge should have directed the jury that the defendants were liable for leakage in the course of the transit, unless the loss arose from the plaintiffs' negligence or default.

Wilde and *C. Pollock* now shewed cause.—First, evidence of the usage of carriers to give notice to the consignor of the refusal of the consignee to receive the goods, was properly rejected.—Secondly, as a matter of law, a carrier is not bound to give any such notice. His duty is, "safely and securely to carry the goods to their place of destination and there deliver to them in a reasonable time, and in a reasonable manner:" Story on Bailments, § 509: *Stephenson v. Hart* (a). If the consignee refuses to receive the goods, the carrier is bound to put them in a place of safety, and having done so his responsibility ceases. In Story on Bailments, § 537, it is said:—"If a

(a) 4 Bing. 476.

carrier between A. and B. receives goods to be carried from A. to B., and thence to be forwarded by a distinct conveyance to C.; as soon as he arrives with the goods at B. and deposits them in his warehouse there, his responsibility as carrier ceases; for that is the terminus of his duty as such. He then becomes, as to the goods, a mere warehouseman. undertaking for their further transportation." To hold that a carrier continues liable after he has tendered the goods to the consignee and deposited them in a place of safety, would subject him to risk from the misconduct of parties over whom he has no control. Moreover, the third count does not allege any common law duty of carriers to give notice to the consignor of the refusal of the consignee to receive the goods, but it is founded on a contract by the defendants to do so, and no such contract was proved. In *Crouch v. The Great Western Railway Company* (a), it was never suggested that it was the duty of the carrier to give the consignor notice.—Thirdly, the learned Judge properly directed the jury that the defendants were not liable for leakage, during the transit, unless it arose from their negligence. A carrier is not liable for accidents arising from the inherent defects of the matters intrusted to him to be carried, of which he has no notice. Thus in *Stewart v. Crawley* (b), where a carrier was held liable for the loss of a dog tied with a string, Lord *Ellenborough* said that "the case was not like that of the delivery of goods imperfectly packed, since in such case the defect was not visible." If the loss arose through bad packing to which the defendants' attention was not called, they are not responsible.

J. Brown and Holl, in support of the rule.—First, the evidence as to the usage was improperly rejected. [*Pollock*,

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(a) *Antè*, p. 491.

(b) 2 Stark. 323.

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C. B.—The evidence was, in fact, not pressed.]—Secondly, it was the defendants' duty, as a matter of law, to give notice to the consignor that the goods had been rejected by the consignee. [*Pollock*, C. B.—That cannot be laid down as a rule universally applicable. For instance, it cannot apply where a package is delivered to a carrier without any information as to the person from whom it comes.] No doubt in such a case the carrier would be excused. But in ordinary cases, where a consignor sends goods which are perishable, or which, as spirits, are liable to depredation, as a matter of law, if the consignee refuses to accept them, some notice should be given to the consignor. In *Story on Agency*, § 208, it is said:—"It is the duty of agents to keep their principals apprised of their doings and to give them notice within a reasonable time of all such facts and circumstances as may be important to their interests; and if by neglect of the agent the principal suffers a loss, he is entitled to be indemnified by the agent." Upon the principle now contended for, it was held in *Callander v. Oelricks* (a) that an insurance broker employed to effect an insurance was bound to give notice to his employers, in case of failure to accomplish the end in view. At least it was the duty of the defendants to take reasonable care of the goods after the refusal of the consignee to accept them. It may happen that a carrier is unable to deliver the goods, and the consignee cannot give notice to the consignor that he has rejected them; as, for instance, if the goods are misdirected. A carrier is entitled to charge the consignor for warehouse-room, if he keeps the goods after the refusal of the consignee to accept them (b); but can it be contended that the carrier may keep the goods as long as he

(a) 5 Bing. N. C. 59.

(b) On this point they referred to *Garside v. The Proprietors of Trent and Mersey Navigation*,

4 T. R. 581; *Hyde v. The Proprietors of the Trent and Mersey Navigation*, 5 T. R. 389.

pleases, without giving notice to the consignor, and charge him during all that time for warehouse-room? [*Bramwell*, B.—It is clear that the defendants had a right to warehouse the goods at Brecon: *Crouch v. The Great Western Railway Company* (a).] The defendants were liable for the loss that arose during the transit, unless they could shew that the loss arose from circumstances which exempted them from liability. Leakage is amongst the various contingencies for which a carrier is liable: *Phillips v. Clark* (b). After the defendants had notice of the leak, it was their duty to have had it stopped: *Peck v. Evans* (c). In *Dale v. Hall* (d), it is laid down that “everything is negligence in a carrier that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events except they happen to be damaged by the act of God or the King’s enemies.” The learned Judge should have told the jury that, if the loss arose from an accident in the transit, the defendants were liable.—They also referred to *Trent and Mersey Navigation Company v. Wood* (e).

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BRAMWELL, B.—I am of opinion that this rule must be discharged. If the learned Judge had said that the defendants were only liable for negligence, that would have been a misdirection. But that is not the effect of the summing up. The substance of it is, that if the damage arose, while the defendants held the goods as carriers, they are liable. Next, Mr. *Brown* contended that there was negligence, on the part of the defendants, in not giving notice to the consignor of the refusal of the package, as well as in not taking precautions against the leak. The true rule is, that when a consignee refuses to accept a parcel tendered to him by a carrier, the carrier must conduct himself as

(a) *Ante*, p. 491.

(b) 2 C. B. N. S. 156.

(c) 16 East, 244.

(d) 1 Wils. 281.

(e) 4 Doug. 287.

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a reasonable man would do with reference to it. I doubt if a consignor has a right to impose on a carrier the burden of doing any thing after he has tendered the goods. But assuming that he has, it is sufficient if the carrier does what is reasonable. It was urged that the carrier must inform the consignor if the consignee refuses to receive the parcel: I wholly deny that as a rule of law. There may be cases in which such a course may be reasonable. But in others the consignor may not be known. Then it was said that the carrier is bound to give such notice where it is reasonable that he should do so, and that it was so in this case. But that was left to the jury, and decided in favour of the defendants. Then it is said that the jury should have been told as a matter of law that such a course was reasonable. Where there is a question of reasonableness, what is reasonable is a question of law; but whether the facts bring the case within the rule of law, is a question for the jury. Here, if the question is one of law, I hold that there was no evidence upon which we can say that it was reasonable that the carrier should have given notice. If it was a question of fact, it was left to the jury and determined by them in favour of the defendants.

WATSON, B.—I am of the same opinion. The rule was moved on three grounds. As to the first, a witness was called to prove the custom, but, on the learned Judge objecting to receive the evidence, the plaintiffs' counsel did not press it or ask him to take a note of the objection. Secondly, it was said that it was the duty of the defendants to give notice of the refusal of the consignee to receive the cask. The learned Judge told the jury that there was no law requiring a carrier to give notice, though in certain cases it might be reasonable that he should do so. I agree that

there is no rule of law binding a carrier, under such circumstances, to give notice to the consignor. No trace of such a doctrine is to be found in the books. No doubt in some cases such a course may be proper, but I see no reason to find fault with the manner in which the case was left to the jury on this point. As to the last point, the law is clear. A carrier is an insurer,—a warehouseman is not. But a carrier is not responsible for damage arising from any inherent defect in an article delivered to him to be carried. If the learned Judge had intended to say that negligence was necessary to render the carrier liable, he would have been wrong. But the language objected to was used by the learned Judge in reference to such loss as occurred by reason of the negligence of the defendants, as distinguished from such as arose from the defect of the cask. His ruling was, that the defendants were liable for the safe carriage of the gin from London to Brecon, in respect of all loss or injury, except such as arose from the defect of the cask, and as to such defect that the onus of proving it lay upon the defendants. I think that a correct statement of the law.

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CHANNELL, B.—I agree that the rule must be discharged. I dissent from the doctrine propounded by the plaintiffs' counsel that, as a matter of law, a carrier is bound to give notice to the consignor in the event of a refusal by the consignee to accept goods sent to him. There may be cases in which such a course may be proper, but it was left to the jury to say whether there was such an obligation under the circumstances of the present case. As to the other point, I think, that in substance, the question left to the jury was whether the loss was occasioned by the inherent vice of the cask, as distinguished from any

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negligence on the part of the defendants, or accident happening in the course of the transit.

POLLOCK, C. B.—I entirely agree with the rest of the Court. The liability of a carrier is so well and universally understood that the term “negligence” in the summing up could not have misled the jury. The substance of what was said was, that the defendants were liable for every loss which happened between London and Brecon not arising from the defect in the cask. An accident is deemed negligence on the part of the carrier.

Rule discharged.

Judg. aff'd in error
3 H & N 203
 Nov. 19.

LEE v. COOKE.

The defendant had distrained a stack of the plaintiff, which was sold under the distress by auction, one of the conditions of the sale being that the purchaser should pay for the same at the fall of the hammer. The plaintiff, who was present at the sale, said, it was “one thing to buy the stack and another to take it away.”

THE declaration was in trespass for breaking and entering a close of the plaintiff, with a count in trover for sheep.

Plea.—Justification as a distress for rates, by the defendant as one of the General Commissioners &c., under certain acts of parliament, (2 Geo. 3), for draining and preserving certain low lands called “The Fens, lying on both sides of the river Witham,” &c., and (41 Geo. 3), “An Act for the better and more effectually draining certain tracts of land called The Wildmere Fen,” &c.

Replication.—That after the said rates had become due, and before the grievances, &c., the General Commissioners, for the time being appointed and acting under and

The purchaser did not pay the price or any deposit, and the stack remained on the plaintiff's premises, a lock having been put on the gate of the field where it was, by the auctioneer. The purchaser having attempted to remove the stack a few days afterwards, was prevented from doing so by the violence of the plaintiff and several other men. He then repudiated the purchase and refused to pay for the stack. The defendant then distrained again. The jury having found that the purchaser had not at any time after the sale an opportunity of taking away the stack.—*Held*, that the second distress was lawful.

by virtue of the said Acts respectively, seized and took and distrained other goods of the plaintiff, to wit, a stack of beans, as a distress for the said rates and taxes in the said plea mentioned, the said goods being liable to a distress for the said rates, and of sufficient value to pay and satisfy the same, and the costs and charges of the said distress, and the appraisement and sale thereof; and the said General Commissioners afterwards sold the said last mentioned goods to one Leverton, and could and might and ought to have fully paid and satisfied the said rates and the said costs and charges, and without any sufficient cause or excuse, refused and neglected so to do.

Rejoinders.—First, taking issue on the replication.—Secondly, that after the General Commissioners had made the distress in the replication mentioned, and before the General Commissioners could satisfy the said rates and taxes by means of the last mentioned distress, the plaintiff wrongfully and forcibly prevented the General Commissioners and their collector from delivering the goods and chattels distrained, as in the replication mentioned, to Leverton; and wrongfully and forcibly prevented Leverton from taking possession of the same, and thereby wrongfully and illegally prevented the defendant from acquiring any legal remedy against Leverton for the price of the said last mentioned goods and chattels; and the plaintiff wrongfully and forcibly kept and detained the last mentioned goods and chattels in his (the plaintiff's) own possession, and converted and disposed thereof to his own use: and that the plaintiff, of his own wrong and by his own act and default, prevented the General Commissioners from obtaining payment of the rates and taxes and the costs of the last mentioned distress or any part thereof by means of a sale of the stack of beans, and rendered the last mentioned distress wholly ineffectual and abortive.—Whereupon issue was joined.

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At the trial before *Cresswell*, J., at the last Lincoln Assizes, it appeared that on the 24th of November, 1855, one Martin, the bailiff of the Commissioners, distrained for 26*l.* 3*s.* 7*d.*, being the amount of the rates in question. "On that occasion he seized a bean stack. On the 30th the stack was sold by auction for 29*l.* 3*s.* 6*d.* to a person named Leverton who was the highest bidder, subject (inter alia) to the following condition:—"The purchaser to remove these lots at his own expence with all faults, &c., to take possession of and to pay for the same at the fall of the hammer (or with the auctioneer's permission at the close of the sale), the whole being sold for ready money." Leverton did not pay the price or make any deposit at the time of the sale. The plaintiff, who was present, said, before the stack was sold, "that it was one thing to buy the stack and another to take it away." The auctioneer put a lock on the gate and the parties then left the premises. A few days after the sale Leverton went to take away the stack, but the plaintiff and five or six other men prevented him from doing so and cut his cart to pieces. He never got the stack, and refused to pay for it. In May 1856, the Commissioners, of whom the defendant was one, issued a second warrant of distress for the same rates, under which the sheep mentioned in the declaration were seized and sold for 34*l.* The learned Judge left it to the jury to say whether they thought that Leverton had at any time after the sale an opportunity of taking away the stack. The jury found that he had not, upon which the learned Judge directed a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict for 34*l.*

Macaulay moved to enter a verdict for the plaintiff accordingly (a).—By the sale the property in the stack

(a) Nov. 6. Before *Pollock*, C. B., *Martin*, B., *Watson*, B., and *Bramwell*, B.,

passed at the fall of the hammer to the purchaser. The stack no longer remained in the possession of the auctioneer, and the purchaser is now liable for the price of it. In *Gillard v. Brittain* (a), it was held that the seller of goods was entitled to maintain an action for the price of them though he afterwards wrongfully retook them. [*Martin, B.*—In that case the goods were actually delivered to the purchaser.] Here there was a perfect sale, and the lien of the seller for the price was waived. The plaintiff would have no answer to an action of trover by the purchaser. That being so, the second distress for the same rates was unlawful: *Dawson v. Cropp* (b). [*Watson, B.*—Suppose before the sale there had been a rescue, might not the defendant have distrained again?] The second rejoinder confesses the sale alleged in the replication, it is therefore bad and affords no answer to the replication.

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Cur. adv. vult.

POLLOCK, C. B., now said.—In this case the plaintiff, who was a farmer, brought an action of trespass against the defendant for making a second distress upon him for drainage rates. There had been a former distress for the same rates, when a bean stack was seized and sold under that distress; but the plaintiff, at the time of the sale, gave notice that he would never permit the stack to be removed from the premises. After the sale he prevented the buyer from removing it, and the buyer therefore repudiated the purchase. The bailiff then distrained a second time. The argument of the plaintiff's counsel was, that under these circumstances there was a sale under the first distress, and therefore that the property passed: that the buyer had a right to go and take possession of the stack by force, if necessary, and that he was bound to rely on his remedy

(a) 8 M. & W. 575.

(b) 1 C. B. 961.

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against the plaintiff. The question was left to the jury by the learned Judge, whether the buyer ever had the means of getting possession of the stack, and the jury found that the plaintiff had prevented him from getting any benefit from his bargain. We think that under these circumstances the sale cannot be set up by the plaintiff as a bar to a second distress.

Rule refused (a).

(a) See *Bagge*, App., *Mawby*, Resp., 8 Exch. 641.

Nov. 23.

ATTENBOROUGH v. CLARK.

Documents referred to in affidavits, and exhibited, must be handed in with the affidavits, and remain in Court until the matter, in respect of which the affidavits are sworn, has been disposed of.

ON a former day in this Term, *Edwin James*, for the defendant, had obtained a rule for a new trial upon affidavits. The affidavits referred to certain documents which were exhibited, but which had not been deposited in Court.

M. Chambers now moved for an order that the documents in question might be brought into Court to enable the plaintiff to take copies of them.

Edwin James appeared to shew cause, upon the ground that there were proceedings pending in another Court in which these documents were required, and that the plaintiff's attorney had seen them.

POLLOCK, C. B.—The documents must be brought into Court and remain there until the matter is disposed of. The Master informs us that the practice is not to draw up a rule unless the documents referred to and exhibited are handed in with the affidavits on which the rule is founded.

CHANNELL, B.—If the documents are annexed to the affidavits they are filed, and they cannot afterwards be taken off the file without the leave of the Court. If they are only referred to as exhibits, the documents may be taken out of Court when the matter has been disposed of (*a*).

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(*a*) See *Tebbutt v. Ambler*, 7 Dowl. 674.

THE KING (George the Third) v. PETER DE LA MOTTE
(a Lunatic), and WILLIAM BOWER, the Mortgagee
claiming the undivided moieties of the several Messuages
or Tenements, Lands and Premises seized under an
extent issued against the said PETER DE LA MOTTE:

On a writ of Extent.

THIS was a petition by William De La Motte, eldest son and heir-at-law of the above named Peter De La Motte, addressed to the Lord Chief Baron and the other Barons of the Court of Exchequer, stating that in and previously to the year 1797, the above named defendant, Peter De La Motte, now deceased, was the agent for his then Majesty's Packet Boats, stationed at Weymouth in the county of Dorset; and was seized or entitled to an estate in fee simple, of or in certain undivided shares of certain freehold messuages, situate in the borough and town of Weymouth and Melcombe Regis, subject to a mortgage thereof, held by the above named defendant William Bower.

The lands of a debtor to the Crown having been extended and sold under the 25 Geo. 3, c. 35, the purchaser in 1802 obtained an order for payment of the money to the deputy remembrancer, subject to the order of the Court of Exchequer. The money was invested in the funds, and the dividends were from time to time re-invested.

The money remained in Court till 1857, when the fund had increased to an amount more than sufficient to satisfy the debt of the Crown.—*Held*, that the Crown was not entitled to a share of the surplus arising from the investment, but only to the principal, interest and costs.

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That the equity of redemption of the said Peter De La Motte was sold, many years since, under an order of this Court, made in this cause upon a writ of extent issued against the said Peter De La Motte, he having by inquisition been found a debtor to the Crown for money had and received for the use of his Majesty, by virtue of his office of agent for his Majesty's Packet Boats stationed at Weymouth; and the monies produced by such sale, amounting to the sum of 595*l.*, were, many years since, paid by the defendant William Bower, the purchaser, into the hands of the deputy remembrancer; and were invested, pursuant to an order made by this Court, in the purchase of the sum of 840*l.* 10*s.* 7*d.* Bank 3 per cent. Consolidated Annuities, which has since been increased by accumulation of dividends to the sum of 1,614*l.* 19*s.* 6*d.* like annuities, which last mentioned sum of annuities with a sum of 1,790*l.* 13*s.* 8*d.* cash, being the amount of dividends thereon which have never been invested, now remains standing in the name of the Queen's remembrancer to the credit of this cause, subject to the order of this Court.

The said Peter De La Motte died sometime in the year 1814 intestate, and without any further proceedings having been had in this cause or otherwise under the said writ of extent, leaving his wife, Sarah De La Motte, as also the petitioner, William De La Motte, his eldest son and heir-at-law, and several other children him surviving; and letters of administration of the estate and effects of the said Peter De La Motte were on the 29th day of July, 1824, granted by the Prerogative Court of Canterbury to the said Sarah De La Motte his widow, who is since dead; and there is now no legal personal representative of the said Peter De La Motte.

No judgment has ever passed for the Crown under the said writ of extent; and the debt in respect of which the

said writ issued was discharged in the year 1822, under the sign manual of King George the Fourth.

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The petitioner submitted that, under the circumstances aforesaid, he being the eldest son and heir-at-law of the said Peter De La Motte deceased, was under and by virtue of such title and in accordance with the provisions of the act of parliament (25 Geo. 3, c. 35), entitled to the respective sums of 1,614*l.* 19*s.* 6*d.* Bank 3 per cent. Consolidated Annuities and 1,790*l.* 13*s.* 8*d.* cash, respectively standing to the credit of this cause; and he therefore prayed that the said sums of 1,614*l.* 19*s.* 6*d.* and 1,790*l.* 13*s.* 8*d.* might, together with any further dividends that might accrue due on the same sums, &c., be transferred and paid to the petitioner, or that their lordships would make such other proper order in the premises as the circumstances of the case might require, and to their lordships might seem meet.

The petition was supported by affidavits identifying Peter De La Motte the petitioner's father with the defendant in this writ of extent; and shewing that the petitioner was the son and heir of the said Peter De La Motte. From the proceedings in the Court of Exchequer, it appeared that by a commission, which issued in the year 1800, Peter De La Motte was found indebted to the Crown in 490*l.* 14*s.* 7½*d.* for monies received by him for the use of his Majesty as agent for his Majesty's Packet Boats at Weymouth; and that on 9th of July, 1801, an order for sale under the extent, reciting that Peter De La Motte had been found and declared to be a lunatic, was made by the Court of Exchequer. The equity of redemption of the premises was sold under the extent to the defendant Bower, who was the mortgagee for 595*l.*, and a report thereof was made on the 22nd of June, 1802, which was confirmed on the 23rd of the same month. On the 26th

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of July, 1802, an order was made by the Court of Exchequer, whereby, after reciting the said orders, upon the motion of counsel on behalf of the purchaser, praying that he might be at liberty to pay into the hands of the deputy remembrancer the amount of the purchase money in trust to attend such further order of the Court as should be made touching the same, and that he might be let into possession, and that the tenant might attorn, and that the deputy remembrancer and all other proper parties might join in and execute proper conveyances, &c. : On reading the several orders, and on hearing Mr. *Abbott*, of counsel appearing on behalf of his Majesty to consent, it was ordered by the Court as prayed. In 1822 the debt of 490*l.* 14*s.* 7½*d.* was by royal warrant cleared off the accounts of the Accountant General of the Post-office as irrecoverable. By the 5 Vict. c. 5, s. 6, it was enacted that on the 5th of October, 1841, the sum of 1,614*l.* 19*s.* 6*d.* 3 per cent. Consolidated Bank Annuities, then standing in the name of the Accountant General of the Court of Exchequer in trust, in a cause depending in the said Court as a Court of Revenue, "*The King v. De La Motte*," should become by force of that Act vested in the Queen's remembrancer in the Court of Exchequer for the time being in trust, to attend the orders of the said Court of Exchequer; and the several sums of cash specified in the 2nd schedule, being cash in the Bank of England to the account of the Accountant General of the said Court of Exchequer in trust, &c., should be vested in the Queen's remembrancer, &c., in trust, &c.; and the same should be applicable to all such purpose as the same were respectively applicable to before the passing of that Act.—The 2nd schedule contained the following item :

"*The King v. De La Motte*.—Cash 1,065*l.* 17*s.* 10*d.*"

Hugh Hill and *W. C. Fooks*, for the petitioner.—The

petitioner is entitled to the fund, subject to the right of the Crown. He does not dispute the right of the Crown to be paid the amount of the debt with interest at 5 per cent. [*Watson, B.*—The Court of Exchequer has invested the fund advantageously; but that does not alter the rights of the parties. Suppose the money had been lost altogether, would De La Motte's estate have been exonerated?] If the securities upon which the money was invested had fallen in value, the Crown would have alleged that the debt was unsatisfied. The nature of the property is not changed by what has taken place; the money in Court is simply an indemnity fund. The Crown has no equitable right to receive any portion of the increase of the fund.—They referred also to *Trevor v. Bluche* (a). [*Pollock, C. B.*—The real question is, whether the Crown is to be considered as a joint proprietor or only as having a lien. If the Crown has nothing more than a lien, the lien must be satisfied, but that is all. As soon as Mr. Hill pointed out that whatever was the result of the investment the Crown must have had its lien satisfied, it became clear that the equity is, that the party who would have had to bear the burden of a loss should have the benefit of the increase. *Channell, B.*—The 25 Geo. 3, c. 35 (b), expressly provides, that

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(a) 6 De Gex, M'N. & G. 170.

(b) Which enacts,—“That it shall and may be lawful to and for his Majesty's Court of Exchequer, and the same Court is hereby authorized, on the application of his Majesty's Attorney General, in a summary way, by motion to the same Court, to order that the right, title, estate and interest of any debtor to his Majesty, his heirs and successors, and the right, title, estate and interest of the heirs and assigns

of such debtor, in any lands, tenements or hereditaments which have been or shall hereafter be extended, under and by virtue of any such writ of extent, or diem clausit extremum, as aforesaid, or so much thereof as shall be sufficient to satisfy the debt for which the same shall have been so extended, shall be sold in such manner as the said Court shall direct; and that when a purchaser or purchasers shall be found, the conveyance of the lands, tene-

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if, after payment of the debt to the Crown, and of all costs and expences incurred in enforcing the payment thereof, there shall be any surplus, the surplus shall belong to the same persons as would be entitled to the lands, &c.]

The Solicitor General and Welsby, for the Crown.—The argument of the petitioner might be well founded, if it were competent to the Crown to levy the balance of the debt, in case the fund in Court proved insufficient to satisfy the whole of it. The money was paid into Court, into the hands of the Crown officer, and thereby

ments or hereditaments so decreed to be sold, shall be made to the purchaser or purchasers by his Majesty's remembrancer in the said Court of Exchequer, or his deputy, under the direction of the said Court; by a deed of bargain and sale, to be enrolled in the same Court; and that from and after the making of such conveyance, and the enrolment thereof as aforesaid, the bargainee or bargainees in such conveyance, and his or their heirs, executors, administrators and assigns, shall have, hold and enjoy the lands, tenements and hereditaments therein comprised for his and their own respective use and benefit, not only against the extent of the Crown, but also against such debtor of the Crown, or the surety or sureties of such debtor, and all persons claiming under such debtor or the surety or sureties, unless by a title paramount to and available in law against such extent as aforesaid; and all moneys which shall become payable from any such purchaser or purchasers as aforesaid, shall

be paid, accounted for, and applied towards the discharge of the debt due to the Crown, and of all costs and expences which shall be incurred by the Crown in enforcing the payment of such debt, in such manner as the said Court of Exchequer shall from time to time order and appoint. And if, after payment of the whole debt to the Crown, and of all costs and expences incurred in enforcing the payment thereof, there shall be any surplus of the moneys arising from any such sale; the said surplus shall belong to the same person or persons as would be entitled to the lands, tenements or hereditaments sold, if there had not been a sale thereof, and shall accordingly be paid to such person or persons under the order and direction of the said Court of Exchequer, upon motion or petition to the said Court, to be made upon such notice to the Crown, and to be supported by such affidavits or other proofs, as to the said Court shall from time to time seem just and reasonable."

the Crown was in the position of a satisfied creditor; and became possessed of so much of the fund as was necessary to satisfy the Crown debt, and entitled to its increase. [*Watson, B.*—The order is an ordinary purchaser's order for the investment of the money. *Channell, B.*—Bower, the purchaser, probably doubting about the title, or on account of the lunacy, obtained an order empowering him to pay the money into Court.] This Court being a Court of Revenue of the Crown, the officer of the Court is an officer of the revenue, and as such, must be deemed to have invested the money for the benefit of the Crown. The Crown's debt was satisfied, and the defendant, or his representative, ought to have come in and claimed the surplus.

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POLLOCK, C. B.—We are all of opinion that the Crown has a right to be paid the debt and the interest upon it; but is not entitled to claim any share of the profit accidentally derived from the investment of the fund. At first I was inclined to view the right of the Crown as that of a joint owner of the fund, and to consider that, if any advantage accrued from the investment, the Crown was entitled to a share of it. But when it was shewn that the claim of the Crown is not to a proportion of the fund but to a definite sum, it appeared manifest that it would be unjust to give the Crown the benefit of the profit accidentally made by the investment; when, if there had been a loss, the Crown would not have been compelled to bear it. There must be an order that the stock be sold, and that the amount of the debt with interest and costs be paid to the Crown, and that the surplus monies be paid over to the petitioner.

BRAMWELL, B.—I am of the same opinion. In fact I

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doubt whether in receiving interest the Crown does not get more than it is entitled to. The 25 Geo. 3, c. 35, enacts, that the moneys to become payable from any purchaser, &c., shall be paid "towards the discharge of the debt due to the Crown, and of all costs and expences which shall be incurred by the Crown in enforcing the payment of such debt, in such manner as the Court of Exchequer shall from time to time order and appoint; and if, after payment of the whole debt to the Crown and of all costs, &c., there shall be any surplus of the moneys arising from such sale, the said surplus shall belong to the same persons who would be entitled to the lands," &c. It would appear, therefore, that the petitioner would in strictness be entitled to have the surplus after payment of the principal debt and costs to the Crown.

WATSON, B.—The purchaser applied to the Court of Exchequer for leave to pay the purchase money into Court. The Court consented and the money, out of which the debt due to the Crown was to be paid, was accordingly paid into Court. It is a fallacy to suppose that the Court ordered the money to be invested for the benefit of the Crown.

CHANNELL, B., concurred.

Ordered that the stock be sold, and that the amount of the debt, with interest and 50*l.* costs, be paid to the Receiver and Accountant General of the Post Office Revenue, and that the surplus moneys be paid over to the petitioner (a).

(a) See *Rex v. De La Motte*, a lunatic, Forrest. 162.

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MASSEY v. BURTON.

Nov. 25.

C. *WRAY LEWIS* had obtained a rule calling on the plaintiff and the judge of the Bloomsbury County Court to shew cause why a writ of prohibition should not issue to restrain them from further proceeding in the above-named plaint.

It appeared from the affidavits on which the rule was obtained, that the plaint was brought to recover 50*l.* due on the balance of an account; that the cause of action arose within the district of the Marylebone County Court, and no part of it within the district of the Bloomsbury County Court; that the plaintiff and defendant, when the cause of action arose, resided in the district of the Marylebone County Court, and the defendant never resided in the district of the Bloomsbury County Court: that the defendant was summoned to attend the Bloomsbury County Court, at the suit of the plaintiff for the same demand, on the 17th of September, and attended accordingly, and objected to the jurisdiction of the Court, upon the ground that the plaintiff did not dwell or carry on business within the district, and the judge accordingly dismissed that summons: that on the 23rd of September a second summons issued from the Bloomsbury County Court with which the defendant was served, and on the 28th of October he attended and objected

By 19 & 20 Vict. c. 108, s. 18, "where a plaintiff shall dwell or carry on business in the district of the Bloomsbury County Court (or other Metropolitan County Courts), and the defendant shall dwell or carry on business within the district of any of the said Courts, the summons may issue and be served either in the district in which the plaintiff shall dwell or carry on business, or in the district in which the defendant shall dwell or carry on business." On the 22nd of September the plaintiff took lodgings and went to reside within the Bloomsbury district, and

on the 23rd a summons issued from the Bloomsbury County Court, in respect of a cause of action which had arisen in the Marylebone district, where the defendant resided. The defendant objected to the jurisdiction, but upon hearing the evidence the County Court judge decided that the plaintiff dwelt within the district of the Bloomsbury County Court. On a motion for a prohibition,—*Held*: First, that the plaintiff did dwell within the Bloomsbury district; and, therefore, that the judge had jurisdiction. Secondly: That it was not material that the plaintiff had taken the lodging for the express purpose of being enabled to sue in that district.

Quære: Per *Martin*, B., whether, the County Court judge having decided the question of the plaintiff's residence after fully hearing the evidence, the Court could review his decision.

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to the jurisdiction of the Court, whereupon the judge took the evidence of the plaintiff, who swore that she resided at 4, Rochester Terrace, Camden Town, within the district and jurisdiction of the Bloomsbury County Court, and that she had come to reside there by the advice of friends in order to come within the jurisdiction of the Court; and she produced receipts for her board and lodging. The occupier of the house in which she had so resided, stated that she came to reside with him on the 22nd of September.

In the affidavits in answer, it was stated that it appeared on the first trial, and the ground of the judgment, as stated by the judge, was, that the plaintiff had not resided at the time when the first summons issued at any residence within the jurisdiction, but had only been a visitor at the houses of various friends without any fixed dwelling or place of business: that on the second hearing, the judge of the County Court on hearing the evidence had decided that the plaintiff did dwell within the district, and that he had jurisdiction, and gave judgment for the plaintiff for 30*l.* and costs; and that since the 22nd of September the plaintiff had had no other residence or place of business except at 4, Rochester Terrace.

Hawkins now shewed cause.—At the time of the issuing of the summons the plaintiff dwelt within the district of the Bloomsbury County Court; and, therefore, by 19 & 20 Vict. c. 108, s. 19, the summons rightly issued from that Court. The plaintiff went to reside within the district on the 22nd of September, and the summons issued on the 23rd. It is not suggested that the plaintiff had any other place of residence. [*Martin, B.*—Is there any authority to shew that, where the County Court judge has determined the question of residence after hearing the evidence of the

parties, we can review his decision? *Bramwell*, B.—On the other point, *Regina v. Hughes* (a) is an authority in favour of the plaintiff.]

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C. Wray Lewis, in support of the rule.—If the judge of the County Court had jurisdiction in the present case, a person who took a bed at an hotel within one of the districts mentioned in the 19 & 20 Vict. c. 108, s. 18, might sue in such district. [*Martin*, B.—I do not know that he might not do so.] The residence was merely colourable.

POLLOCK, C. B.—I am of opinion that this rule must be discharged. Apart from the doubt which has been expressed by my brother *Martin*, as to our power to review the decision of the judge of the County Court in a case like the present, I think that his judgment was correct. The plaintiff had taken possession of a lodging within the district before the summons issued, and continues to reside there till the present time. It is impossible that we can say that she did not dwell within the district.

MARTIN, B.—I am of the same opinion. I see no reason why a person may not take a lodging in a particular district for the express purpose of suing in that district, if he pleases.

BRAMWELL, B., and *CHANNELL*, B., concurred.

Rule discharged, with costs.

(a) 1 Dears. & B. C. C. 188.

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HUNTLEY v. SIMSON.

In an action for maliciously causing the plaintiff to be arrested, it appeared that the plaintiff was employed to work up some timber into spars, under a contract with H., by which he was to be paid 48*l.* by weekly instalments during the progress of the work, and the balance on the completion of it. Before the work was completed H. assigned all his goods to the defendant and others for the benefit of his creditors generally. At this time about 19*l.* remained due to the plaintiff as the value of the work done up to that time. The plaintiff went to the defendant's yard where the spars

were and asked for them, and on the defendant's foreman refusing to give them up, he took them away the next morning at 4 o'clock A.M. His attorney then wrote to the defendant's attorney to say that he claimed a lien on the spars. The defendant demanded them back, but the plaintiff refused to give them up. The plaintiff was then taken into custody for stealing the spars on the information and complaint of the defendant. He asked the defendant why he gave him into custody, to which the defendant replied: "You had no right to take the spars away, I think you merely fetched them away to get what was your due."—*Held*, that there was evidence of the absence of reasonable and probable cause for the charge.

THE first count of the declaration alleged that the defendant assaulted the plaintiff, and caused him to be imprisoned on a false charge that he had been guilty of felony. Second count: that the defendant falsely, maliciously, and without reasonable or probable cause, charged the plaintiff before a magistrate with having stolen some goods, and upon such charge procured the justice to grant a warrant for his apprehension; that the justice did accordingly grant his warrant, and that the defendant, under and by virtue of the said warrant, caused the plaintiff to be arrested and imprisoned, and afterwards brought in custody before the justice who, having heard the charge, dismissed the same, and discharged the plaintiff out of custody, &c.

Plea.—Not guilty.

At the trial, before *Channell*, B., at the last Durham Assizes, it appeared that the plaintiff, who was a mast and block maker, had entered into an agreement in writing with one Harkess, a ship builder, whereby the plaintiff agreed "to do all the labour work of the hull with spars, mast, and blocks, and outfittings complete, except steering-wheel, for a new ship now in course of construction, for the sum of 48*l.*"; for which Harkess was "to pay the sum of 48*l.* in monthly instalments of 6*l.* per month, and when

the whole work was complete, the residue of the money, &c." Harkess not having room on his premises, the timber was placed in the yard of the defendant to be worked up into spars. On the 9th of May, 1857, Harkess assigned all his property to the defendant and others as trustees for the benefit of his creditors. At this time the plaintiff had nearly completed his work. He had received 22*l.* 12*s.*, leaving 19*l.* 8*s.* as the value of the work done by him under the agreement up to that time. The plaintiff hearing that Harkess had got into difficulties, on the 26th of May went to the defendant's yard and requested to be allowed to take a portion of the spars away. The defendant's foreman refused to allow him to take them, but at 4 o'clock in the morning of the next day the plaintiff went to the defendant's yard and took the spars. On the 28th of May the plaintiff's attorney wrote the following letter to the attorneys acting for the defendant and others, as assignees of Harkess:—

"Re Harkess.—I am instructed by John Huntley, mast and block maker to give you notice as solicitors to the assignees, that an agreement existed for Huntley to make certain blocks and spars for the ship building by Mr. Harkess, Mr. Harkess finding materials, for the sum of 48*l.* That the blocks and spars were nearly prepared at the time of the bankruptcy, and were in the possession of Huntley on the premises of Mr. Simson. That the work was nearly completed, as it would only take about 6*l.* to finish them, and that Huntley has removed spars valued about 30*l.*, that he has received in cash and goods on account 22*l.* 12*s.*, and therefore wants a balance of 19*l.* 8*s.* for the proportionate part of the work done by him. And I am instructed further to give you notice, that he has a lien upon these spars for that amount, and that unless it be paid to

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me to-morrow, the spars will on Saturday be sold for what they will fetch."

The defendant went to the plaintiff and claimed the spars; the plaintiff said that as soon as he was paid for his labour the defendant might have them. The defendant then said that if the spars were not returned, the plaintiff would be charged with stealing them; and the plaintiff having persisted in detaining them, was afterwards taken into custody for stealing the spars, upon the information and complaint of the defendant, dated the 1st of June. The plaintiff stated that he asked the defendant the reason why he charged him with stealing the spars, and that the defendant said, "You had no right to take the spars, I think you merely fetched the spars away to get what was your due."

Upon these facts, the defendant's counsel objected that the plaintiff must be nonsuited, on the ground that the absence of reasonable and probable cause was not shewn. The learned Judge declined to nonsuit the plaintiff. He told the jury that the defendant was not liable unless he had acted maliciously and without reasonable and probable cause, and left it to them to say whether they believed that the defendant had acted maliciously, pointing out that the absence of probable cause was not conclusive evidence of malice. The jury found a verdict for the plaintiff with 15*l.* damages, leave being reserved to the defendant to enter a verdict for him, if the Court should be of opinion that the learned Judge ought to have ruled that there was no evidence of the want of reasonable and probable cause.

Hugh Hill having obtained a rule nisi accordingly,

Overend and *J. A. Russell* now shewed cause.—It is clear that the defendant did not believe that a felony had been committed. The plaintiff, probably, had a lien on the spars,

and took possession of them in exercise of such right. But, even supposing that he had no right, there is no pretence for saying that an act done by the plaintiff under a mistaken notion of his rights is a felony.

The Court then called on

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Hugh Hill (with whom was *Hindmarch*) to support the rule.—The plaintiff took the spars for the purpose of giving himself a lien upon them. The question in some of these cases has been, whether the party taking the goods did so for the purpose of acquiring any benefit to himself. But in *Regina v. Privett and Goodhall* (a), the taking of unwinnowed oats by servants to give them to their master's horses was held to be a larceny, though the servants were not answerable at all for the condition or appearance of the horses. *Rex v. Morfit* (b) is to the same effect. Here there was an abundant advantage to be gained by the plaintiff. The question is, not what was the impression in the mind of the defendant, but whether, in the eye of the law, the facts constituted a reasonable cause for the charge:—whether the facts were such as would have induced a person of ordinary understanding to make the charge. [*Overend* referred to *Turner v. Ambler* (c).] The plaintiff, to gain a benefit to himself, viz., to get payment of his wages in preference to other creditors, clandestinely and against the will of the owner took possession of the goods, in order to apply them to purposes not sanctioned by the owner.

POLLOCK, C. B.—I am of opinion that this rule must be discharged. The expression alleged by the plaintiff to have been used by the defendant, shewing that he did not think that the plaintiff meant to steal the goods, was

(a) 1 Den. C. C. 193.

(b) Russ. & Ry. 307.

(c) 10 Q. B. 252.

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not denied or explained. It is therefore impossible to say that there was no evidence of the absence of reasonable and probable cause for the charge.

BRAMWELL, B.—I am of the same opinion. It may be, that there was some evidence of reasonable and probable cause for the charge. But this rule was moved on the ground that there was no evidence of the absence of reasonable and probable cause. I think that there was. It is not clear that the plaintiff had no lien. If he had not, he may have acted as he did under the belief that he had a lien. The plaintiff, a person known in Sunderland, having a house and yard of his own there, took the goods, not concealing the fact that he had done so; and the only imputation against him is, that he took them at an unseasonable hour. The natural conclusion is, that the plaintiff acting under a mistaken notion of his rights, took them when he could get them without opposition, and that there was not the slightest pretence for the charge.

WATSON, B.—An assertion of right is not a felony. I think, therefore, that my brother *Channell* was quite correct in ruling that there was an absence of reasonable and probable cause.

CHANNELL, B.—In cases of this kind, where the facts are not disputed, it is for the Judge to say whether they shew a want of reasonable and probable cause. Upon the facts here, I think that there was an absence of reasonable and probable cause.

Rule discharged.

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THE first count of the declaration stated, that by an indenture dated the 6th June, 1853, and made between the defendant (and other persons therein named,) of the first part, Baron Kingsale and J. Tidd of the second part, and three of the trustees of the plaintiffs (therein named,) of the third part: after reciting that the said Baron Kingsale was entitled to a policy of assurance upon his own life, dated the 31st January, 1853, under the hands of three of the directors of the National Assurance and Investment Association, for the sum of 600*l.* at and under the annual premium of 14*l.* 17*s.*; and that J. Tidd was entitled to a policy of assurance on his own life, dated the 31st May, 1853, under the hands &c., for the sum of 600*l.*, at and under the annual premium of 27*l.* 19*s.* 6*d.*; and that the parties thereto of the first part had applied to the parties thereto of the third

The plaintiffs having recovered judgment against the defendant, in June, 1855, issued a *ca. sa.* thereon, and a warrant was delivered to W. an officer of the sheriff. A few days afterwards the managing clerk of the plaintiffs' attorney wrote to W. requesting him not to execute the writ. In January, 1856, the defendant was arrested by S., another officer of the sheriff, under a *ca. sa.* issued

on a judgment obtained against the defendant by another creditor. On the same day the defendant paid the amount due on that judgment. S., before discharging the defendant, sent to the sheriff's office to inquire whether there were any other writs against him, and in answer received a copy of the warrant granted on the writ issued by the plaintiffs. The managing clerk of the plaintiffs' attorney having heard of the defendant's arrest reminded W. of the countermand of the plaintiffs' writ, when W. required a countermand signed by the attorney which was sent, and the defendant was discharged from custody. In an action by the plaintiffs against the defendant on their judgment,—*Held*: that there was no arrest of the defendant under the plaintiffs' writ, either in fact or in law, and that, even if there had been, there was no discharge from custody by the plaintiffs, and consequently the action on the judgment was maintainable.

The plaintiffs lent to the defendant 600*l.* on the security of an indenture whereby two policies of insurance were charged with the payment of the principal money and interest. The indenture contained a covenant by the defendant to pay the premiums of the policies. By their terms the policies only remained in force provided the premiums were paid every year. The defendant paid the first year's premium only, and the plaintiffs having sued him on his covenant for nonpayment of the three subsequent years' premiums:—*Held*, that as it did not appear that the plaintiffs had sustained any loss by the defendant's neglect to keep up the policies, the measure of damage was not the amount of the three years' premiums, but the plaintiffs were entitled to nominal damages only.

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part to lend them the sum of 600*L*., which the parties thereto of the third part had agreed to do upon having the repayment thereof with interest, and the payment of the premiums, secured by a charge upon the said two policies and by the joint and several covenant of the said parties thereto of the first and second parts: the defendant covenanted with the parties thereto of the third part, &c., (setting out a covenant for payment of the 600*L*. and interest). And also that the defendant (and the other parties thereto of the first part), or the said Baron Kingsale, and J. Tidd would from time to time so long as the said principal sum of 600*L*. or any part thereof, or any interest thereon, should remain unpaid, regularly pay or cause to be paid the said premiums and any other monies which should be requisite or necessary for keeping on foot the aforesaid two policies, or each of them, on the first days on which the same premiums or other monies should respectively become payable. (There followed a covenant for payment of the costs of any action brought for the recovery of the 600*L*. and interest).—Averments: that the indenture and covenants were made and entered into with the parties of the third part in trust for the plaintiffs, and that the plaintiffs were and are interested therein within the true intent and meaning of the National Assurance and Investment Association Act, 1854, and that all conditions precedent have been performed, &c.—Breaches: first, that although after the making of the indenture, and whilst part of the said sum of 600*L*. remained unpaid, and before this suit three premiums on the policy on the life of the said Baron Kingsale became due and payable, and the same were requisite and necessary for keeping on foot the said policy, yet the defendant, (and the parties of the first and second parts,) did not pay the said premiums or any of them.—Second breach: non-payment

of three premiums due on the policy on the life of the said J. Tidd. (There was a third breach in respect of the nonpayment of the costs of an action for the recovery of the 600*l.* and interest).—The second count of the declaration stated, that on the 22nd May, 1854, M. Chayton, G. Stone and G. Paget, then being three of the trustees of and for the plaintiffs, did, in the Court of Exchequer, &c., by the consideration and judgment of the said Court recover against the defendant the sum of 456*l.* 8*s.* 11*d.*, which in and by the said Court was then adjudged to the said M. Chayton, G. Stone and G. Paget, for a certain debt due from the defendant and for their damages, &c., whereof the defendant was convicted, as by the record &c. appears; which said judgment still remains in force. And the said M. Chayton, G. Stone and G. Paget have not, nor have the now plaintiffs obtained any execution or satisfaction of the said judgment as to 375*l.* parcel, &c., and the said last mentioned sum, and 50*l.* for interest &c., remains due and unsatisfied.—Averments: that the said M. Chayton, G. Stone and G. Paget brought the said action and recovered the said judgment in trust for the plaintiffs and for a debt due to them in trust for the plaintiffs, and that the plaintiffs were and are interested in the said debt and judgment within the true intent and meaning of the aforesaid act of parliament, and that before this suit all things had been done and had happened which are required by the said Act to enable the plaintiffs to bring and prosecute this action on the said judgment, under the provisions of the said Act.

Pleas (inter alia).—As to so much of the first count as charges the nonpayment of the premiums on the said policies: that no such premiums became due as alleged.

To second count: that after the recovery of the said judgment, the said M. Chayton, G. Stone and G. Paget,

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for having satisfaction thereof, caused to be issued out of the said Court a writ of *capias ad satisfaciendum* directed to the sheriff of Middlesex, whereby the said sheriff was commanded, &c. (setting out the writ), which said writ was delivered to the said sheriff to be executed. By virtue of which writ the said sheriff afterwards took the defendant, &c.; and the defendant remained and was in the custody of the said sheriff under and by virtue of the said writ to satisfy the plaintiffs in the said action, for a long time and until they consented to his being discharged from the custody of the said sheriff.

The replications respectively joined and took issue on the pleas.

At the trial, before *Pollock*, C. B., at the Middlesex sittings after last Trinity Term, it appeared that in June 1853, the defendant and other persons, who were directors of a Mining Company, borrowed of the plaintiffs 600*l*. As a security, they executed the indenture declared on, whereby the two policies of assurance therein mentioned were charged with the payment of the 600*l*. and interest. The indenture contained the covenant (set out in the first count of the declaration), for payment of the premiums on the policies which were respectively dated the 31st January and 31st May, 1853. These policies provided (in the usual form) "that if the assured shall die before the expiration of the said term of twelve calendar months, to be computed from the day of the date of this policy; or shall live beyond such day and he, or his assigns, shall at or before the expiration of that day, and at or before the expiration of every succeeding twelve calendar months, during the continuing of this assurance, pay at the office of the Association the premium of &c., then the funds and other property of the Association shall be subject and liable to the sum of 600*l*." The first year's premium

alone was paid; and the plaintiffs now sought to recover the sum of 128*l.* 9*s.* 6*d.*, as the amount of premiums due in the years 1854, 1855 and 1856. Some payments had been made on account of the 600*l.* and interest, and on the 22nd May, 1854, the plaintiffs obtained a judgment against the defendant, and the other parties liable under the indenture, for the balance. On the 18th of June, 1855, a writ of *ca. sa.* on this judgment was lodged with the sheriff of Middlesex, and a warrant thereon was delivered to an officer, named Willis. Some further payments on account were afterwards made, and in consequence the managing clerk of the plaintiffs' attornies, Messrs. Miller & Horn, wrote to Willis the following letter:—

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“78, King William Street,

“Gentlemen,

22nd June, 1855.

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“Do not execute the *ca. sa.* in this action.

“MILLER & HORN.”

“Messrs. Willis & Willis,

“Officers to the Sheriff of Middlesex.”

On the 4th January, 1856, the defendant was arrested by a sheriff's officer, named Sloman, under a *ca. sa.* issued on a judgment obtained against him by one Rennie. On the same day the defendant paid the amount due on that judgment. The officer (according to the usual practice), before discharging the defendant from custody, sent to the sheriff's office to inquire whether there were any other writs of *ca. sa.* against him, and in answer he received a copy of the warrant granted by the late sheriff on the writ issued on the plaintiffs' judgment. The clerk of the plaintiffs' attorney having been informed of the defendant's arrest, went to Willis and reminded him of the countermand on the 22nd June, 1855. Willis said that he should require

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a countermand signed by the principals, whereupon the plaintiffs' attornies sent him the following letter:—

"78, King William Street,
 5th Jan. 1856.

"Gentlemen,

"Chayton and Others v. Devon and Others.

"The countermand of execution of ca. sa. herein, written and dated on the 22nd of June last, was given and signed in our name by our managing clerk, Mr. Murray, he having at the time full authority for so doing.

"Yours &c.

"MILLER & HORN."

"Messrs. Willis & Willis,

"Officers to the Sheriff of Middlesex."

Willis thereupon informed Sloman of the countermand of the plaintiffs' writ, and the defendant was immediately discharged from custody. The sheriff was afterwards ruled to return the writ, and he returned that by the instructions of the plaintiffs' attornies, he had forborne to execute it. There was evidence that in London and Middlesex it is usual to countermand a writ of execution by writing to the officer who holds the warrant, but in other counties by writing to the sheriff.

It was submitted on behalf of the defendant; first, that the evidence supported the plea of the defendant's discharge from custody: secondly, that the plaintiffs were only entitled to recover nominal damages in respect of the non-payment of the premiums of insurance. His lordship reserved the points, and a verdict was entered for the plaintiffs for the amounts claimed.

Rochfort Clarke, in the present Term, obtained a rule nisi to enter the verdict for the defendant on the second count, and to reduce the damages to a nominal amount on the first count, against which

J. Brown and J. H. Davidson shewed cause (Nov. 17.)—First, the action on the judgment is maintainable. There was no actual arrest of the defendant, under the ca. sa. issued by the plaintiffs, neither was there any constructive arrest. A sheriff is entitled to detain a defendant in custody for a reasonable time after the receipt of an order for his discharge, for the purpose of searching the office and ascertaining whether other writs are lodged against him: *Samuel v. Buller* (a). The question, under what circumstances an arrest by the sheriff, at the suit of one plaintiff, will operate as an arrest under all writs held by the sheriff against the same defendant, was fully considered by the House of Lords in *Hooper v. Lane* (b). There *Erle, J.*, said:—"This is true in the sense that after a caption under one writ, changing freedom into imprisonment, no other caption is necessary to bring the party into custody, under other writs. Caption or arrest, in the sense of changing freedom into imprisonment, cannot possibly be repeated till the imprisonment has been changed back into freedom again. But it is not true in the sense that an arrest under one writ operates by law as an arrest under any other writ. Still less is it true that it affects the powers of the sheriff in respect of other writs. If a bailiff with one warrant arrests, the custody is confined to that warrant. If he has several warrants, the arrest is under all that he holds; and after the arrest, and before notice to the sheriff, the defendant is not in custody under other writs lying in the sheriff's hands. For instance, if he is rescued from the bailiff immediately after the arrest, it seems that those plaintiffs only can sue the rescuers, who had warrants in the bailiff's hands: *Hodges v. Marks* (c)." *Robinson v.*

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(a) 1 Exch. 439.

(c) Cro. Jac. 485.

(b) In Dom. Proc. July 2 and August 28, 1857.

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Yewens (a), Pearson v. Yewens (b), and Collins v. Yewens (c), shew that a bailiff who arrests in a particular suit, is not identified with the sheriff as to other suits, unless he holds warrants in those suits also. Here the officer who made the arrest had no warrant in the plaintiff's suit; that warrant was held by another officer, and its execution was countermanded. The notice not to execute the writ was equivalent to a withdrawal of it; and its subsequent execution would have rendered the sheriff liable as a trespasser: *Barker v. St. Quintin (d), Hunt v. Hooper (e)*. The officer who held the warrant was the sheriff's agent to receive the countermand. Notice to a sheriff's officer is notice to the sheriff: *Howard v. Cauty (f), Imray v. Magnay (g), Christopherson v. Burton (h)*.—Secondly, under the first count of the declaration the plaintiffs are entitled to recover as damages the amount of the unpaid premiums. The default in payment of the premiums does not render a policy absolutely void; but only voidable at the option of the assurers, and they may, if they think fit, waive the forfeiture by accepting the premiums after they are due.

Wilde and Rochfort Clarke, in support of the rule.—First, there was no effectual countermand of the execution of the writ. The letter written by the clerk of the plaintiffs' attorney to the sheriff's officer was not only not acted on at the time, but its authority was subsequently disputed. Besides an attorney has no authority to countermand a writ of execution. His authority ceases with the judgment, except for the purpose of issuing execution and receiving

(a) 5 M. & W. 149.
 (b) 5 Bing. N. C. 489.
 (c) 10 A. & E. 570.
 (d) 12 M. & W. 441.

(e) 12 M. & W. 664.
 (f) 2 D. & L. 115.
 (g) 11 M. & W. 267.
 (h) 3 Exch. 160.

the proceeds: *Savory v. Chapman* (a). [*Channell*, B.—The attorney may order the sheriff to withdraw from possession under a fi. fa.: *Levi v. Abbott* (b).] A letter written to a sheriff's officer by an attorney's clerk, without any specific authority from the attorney, cannot destroy the legal effect of a writ lodged with the sheriff. In order to countermand a writ, notice should be given at the sheriff's office. The officer who holds the warrant is not the sheriff's agent to receive a countermand, but merely his agent to execute the writ. In *Drake v. Sykes* (c), *Lawrence*, J., said:—"It is of great importance to the sheriff to know for what acts and to what extent he is answerable for the acts of his bailiff." The under sheriff is the recognised agent of the sheriff, to whom notice of countermand should be given: the sheriff's officer is only his agent where, from the necessity of the case, the sheriff cannot act. The doctrine laid down in *Barratt v. Price* (d), that an arrest under one writ operates as an arrest under all writs then in the sheriff's hands against the same defendant, was recognised and affirmed in *Hooper v. Lane*.—Secondly, the plaintiffs are only entitled to nominal damages in respect of the nonpayment of the premiums of insurance. By the terms of the policy the insurance is for one year; then if at or before the expiration of that period the premium is paid, the policy continues in force for another year; and so on from year to year. No premium having been paid after the first year, the policy was at an end; but the plaintiffs have not sustained any damage thereby. If, indeed, the policies had been effected in another insurance company, and the plaintiffs had paid the premiums, the case might have been different. [*Pollock*, C. B.—The damage is the possible loss, which the plaintiffs have escaped. It is like the case of a covenant

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(a) 11 A. & E. 629.

(c) 7 T. R. 113, 117.

(b) 4 Exch. 588.

(d) 9 Bing. 566.

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to insure a ship for a particular voyage, which the covenantor neglects to do, and the ship arrives in safety at her place of destination.]

Cur. adv. vult.

POLLOCK, C. B., now said.—In this case there were two questions: first, whether the defendant had been in custody at the suit of the plaintiffs under a writ of *ca. sa.* issued on the judgment, which is the subject of the second count of the declaration, and had been discharged by them; for if so, the debt was gone; and, consequently, the action on the judgment could not be maintained. The other question arose on the first count, which was for the nonpayment of certain premiums of insurance, which the defendant had covenanted to pay. With respect to that count, it was not disputed that the action was maintainable, and the point raised by the defendant's counsel was that the plaintiffs were entitled to nominal damages only. Upon the second count, the defendant's counsel contended that the defendant had been in custody under the writ of *ca. sa.* at the suit of the plaintiffs and had been discharged by them, and, therefore, inasmuch as the judgment was satisfied, the defendant was entitled to have the verdict entered for him on the second count. We are all of opinion that neither in point of law or fact was the defendant in the custody of the sheriff at the suit of the plaintiffs. Upon the facts that is quite clear. But if there were any doubt about it, and if it could be successfully contended (as we think it cannot) that the defendant was in point of law in custody at the plaintiffs' suit, he clearly was not discharged by them or by anybody having authority from them. The debt, therefore, has not been satisfied; and the action upon the judgment is maintainable.

With respect to the other count, we think that there

is considerable weight in the argument of the defendant's counsel. It is clear that the amount of the premiums is not the criterion of damage. The premiums not having been paid by the covenantors, if the covenantees had paid them in order to keep up the policy, or, for their own security, had effected another policy, there might have been ground for substantial damages; but here there was nothing but the loss of the security, and it does not appear that any actual injury was sustained by the plaintiffs in consequence of that. The plaintiffs have not put us, nor did they put the jury, in a situation to estimate what damages they are entitled to, if the amount of the premiums does not furnish the criterion. As the Court cannot substitute any other measure of damage, we think that on the first count the plaintiffs are entitled to nominal damages only. On the second count there must be a reference to the Master as to the amount due under the judgment, and the verdict will stand for the plaintiffs for that amount.

Rule accordingly.

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EJECTMENT to recover possession of a piece of land with the messuages, dwelling-houses, shops, &c., thereon built.

At the trial before *Watson, B.*, at the last Newcastle Summer Assizes, the following facts appeared.—By inden-

A lease contained a covenant on the part of the lessee that he would not, without the consent of the lessor, use, exercise, or

carry on in the demised premises any trade or business whatsoever, nor convert the dwelling-houses into a shop, nor suffer the same to be used for any other purpose than dwelling-houses. One of the dwelling-houses was converted into a public house and a grocery shop, and the lessor, with full knowledge of it, for more than twenty years received the rent. The plaintiff, having purchased the reversion of the lessor, brought an action of ejectment for the breach of the covenant.—*Held*, that the user of the premises in their altered state for more than twenty years, with the knowledge of the lessor, was evidence from which a jury might presume a licence.

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ture made the 19th April, 1822, between Sir Matthew White Ridley of the one part, and Alexander Doeg of the other part, Sir M. W. Ridley demised to A. Doeg, a piece of ground, called the "Redbarnes," near the town of Newcastle, together with two dwelling-houses built thereon, for a term of fifty-four years, at the rents specified. The indenture contained (amongst others) a covenant by Doeg to keep the demised premises in repair, and also the following:—"And that the said A. Doeg, his executors, administrators, or assigns, shall not, nor will, at any time during the continuance of the said term hereby granted, use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on, in or upon the said demised premises, or any part thereof, any trade or business whatsoever without the express consent in writing under the hand of the said Sir M. W. Ridley, his heirs or assigns, for that purpose first had and obtained; nor shall nor will without such consent as aforesaid, at any time during the said term, make any additional erections or buildings upon the said piece or parcel of ground. And shall not nor will, without such consent as aforesaid, convert the said messuages, tenements, or dwelling-houses, or other the premises hereby demised, or any part thereof, into a manufactory, shop, warehouse, shed, or place for sale for goods or merchandize; nor use nor suffer the same to be occupied or used in any other manner or for any other purpose than as dwelling-houses and gardens."—(Then followed a covenant by A. Doeg not to assign the lease without the consent in writing of Sir M. W. Ridley.)—"Provided always, nevertheless, and these presents are upon this express condition, that if the said A. Doeg, his executors, &c., shall neglect or fail in the performance or observance of any or either of the covenants or agreements hereinbefore contained, which by him or them are to be performed or observed respectively, then

and from thenceforth, in either or any part of the said cases this present demise or lease, and the covenant for quiet enjoyment hereinafter contained shall wholly cease and be void, and the said Sir M. W. Ridley, his heirs, &c., shall or lawfully may, immediately, or at any time thereafter, enter into and upon the said hereby demised premises, or any part thereof in the name of the whole, and repossess, retain and enjoy the same as in his and their first and former estate, anything herein contained to the contrary in any wise notwithstanding." At the time this lease was granted, the two dwelling-houses therein mentioned were villas with ornamental and kitchen gardens, called "Stepney Villa" and "Stepney Cottage." More than twenty years ago (the precise time did not appear) alterations had been made in the premises. "Stepney Villa" was enlarged at each end, one of which was converted into a public house, and the other into a grocery and flour shop: stables and workshops were built on the gardens. The rent was regularly paid and no complaint was made of the alterations until May 1857. By indenture made the 9th April, 1828, between A. Doeg of the first part, G. Henderson and H. Marshall, of the second part, Sir M. W. Ridley of the third part, and E. Pawson of the fourth part: reciting (inter alia), that A. Doeg, on the 11th June, 1816, was declared bankrupt; that G. Henderson and H. Marshall were appointed his assignees, and that on the 16th June, 1818, A. Doeg obtained his certificate: also reciting the indenture of lease dated the 19th April, 1822, and that the lease was subject to a covenant not to assign without the licence in writing of the said Sir M. W. Ridley: also reciting that A. Doeg had applied to E. Pawson for the loan of 250*l*., who thereupon agreed to comply with the said application on having the repayment, with interest, secured to her by the covenant of A. Doeg, and by a mortgage of the tenements comprised in the said indenture of lease: and as a further inducement

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to E. Pawson to make the said loan, A. Doeg agreed to sustain the value of the proposed security, by keeping the buildings therein in repair and insuring them: It was witnessed, that in consideration, &c., "A. Doeg with the consent of Sir M. W. Ridley, testified by his executing these presents, did assign, &c." (stating an assignment of the ground and buildings demised by the indenture of lease of the 19th April, 1822): To have and to hold, &c., "subject as between Sir M. W. Ridley, his heirs and assigns, and E. Pawson, her executors, &c., to, but freed and discharged as between (a) A. Doeg, his executors, &c., from not only the payment of the several yearly rents reserved, &c., but also to the performance and observance of the covenants and agreements contained in the same indenture, and which ought to be observed and performed by the lessee or assignees for the time being of the tenements thereby demised, from and after the day of the date of these presents; and to E. Pawson, her executors, &c., during all the residue or remainder of the said term of fifty-four years," by way of mortgage, and subject to the proviso hereinafter contained for redemption. By a memorandum in writing, dated the 2nd April, 1831, Sir M. W. Ridley granted to A. Doeg, his executors, &c., "full and free liberty, licence, and lawful and absolute authority, to assign, demise, or otherwise dispose of all, or any part, of the piece of ground, messuages," &c., demised by the indenture of the 19th April, 1822, at his discretion, "for all or any part of the estate, term, or interest therein," &c., "any proviso, covenant, clause, matter, or thing contained in the said indenture of demise to the contrary in anywise notwithstanding." On the 23rd May, 1857, the plaintiff purchased of the heir-at-law of Sir M. W. Ridley, (who died

(a) On the argument, the words "her and" should be inserted after "between." Court observed that this was a clerical error, and that the

in 1836), his interest in the reversion of the property in question, subject to the indenture of lease of the 19th April, 1822. This action was commenced on the 5th June, 1857.

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It was objected on behalf of the defendant, first, that the user of the premises contrary to the covenant was not a continuing breach, and, if so, it was waived by the acceptance of rent: secondly, that the right of re-entry was put an end to by the indenture of the 9th April, 1828, and the licence of the 2nd April, 1831: thirdly, that an assignee of the reversion cannot take advantage of a forfeiture before notice of the assignment to him. The learned Judge reserved the points; and it being admitted "that part of the premises had been used for many years, and still was used, for trade and business; and with perfect knowledge thereof, the lessor received rent from time to time," his lordship merely left to the jury the question of repair, and they found for the defendant. Leave was then reserved to the plaintiff to move to enter a verdict for him.

Overend, in the following term, obtained a rule nisi accordingly, on the ground that the user of the premises contrary to the covenant was a continuing breach of covenant and not waived.

Temple, in the same term, obtained a rule whereby it was ordered, in the event of the Court being about to make the plaintiff's rule absolute, that the plaintiff shew cause why the verdict found for the defendant should not nevertheless stand: on the following grounds.—First that the mortgage of the 9th April, 1828, put an end to all right of re-entry.—Secondly, that the lessor having been a party to the mortgage, and to the licence to assign, the right of re-entry was gone. Thirdly, that the conveyance to the plaintiff shews an existing lease at that time, and nothing

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was proved to have occurred afterwards, unless it was non-repair, to give plaintiff a right of entry, and that the jury found against. Fourthly, that no notice was given to the defendant of the assignment to the plaintiff; that an assignee of the reversion can only take advantage of a right of re-entry accruing after notice.

Temple and Udall now shewed cause against the plaintiff's rule.—First, there was no continuing breach of covenant, and the forfeiture incurred by the alteration of the premises was waived by the acceptance of rent. *Doe d. Ambler v. Woodbridge* (a) is relied on by the plaintiff. There, however, the words of the covenant were “alter, convert, or use,” and the decision proceeded on the ground that the user was a continuing breach. But the Court said,—“The conversion of a house into a shop, is a breach complete at once, and the forfeiture thereby incurred is waived by a subsequent acceptance of rent.” Therefore, as regards the conversion of part of the premises into a public house and shop, that case is an authority that the breach of covenant was complete at the time the alteration was made; and, consequently, the plaintiff can only proceed in respect of the user. But the receipt of rent by the lessor for a series of years, with full knowledge that the premises were used for trade and business, is evidence for the jury of a licence by him so to use them: *Doe d. Sheppard v. Allen* (b). [The proviso does not render the lease absolutely void, but merely voidable at the election of the lessor: *Arnsby v. Woodward* (c).—Secondly, though the lessor might have taken advantage of the forfeiture, the assignee of the reversion cannot. In 1 Wms. Saund. 288 b, note, it is said:—“At the common law, an assignee or grantee of a reversion could

(a) 9 B. & C. 376.

(b) 3 Taunt. 78.

(c) 6 B. & C. 519.

not enter for a condition broken; for to prevent all maintenance the common law did not allow an assignment of a title of entry or re-entry: Co. Litt. 214. But if the estate ceased by breach of the condition without entry, as where in a lease for years the lease is to be void by breach of the condition, the assignee of the reversion might take advantage of it at common law: Co. Litt. 214 *b*, 215 *a*; 1 Rol. Abr. 473; 3 Rep. 65 *a*; *Pennant's Case*. But where a lease *for life* was with such a condition, or a lease for years with a condition that such a thing be done *the lessor shall re-enter*, the grantee of the reversion could not enter by common law: Co. Litt. 215 *a*." The statute, 32 Hen. 8, c. 34, gave to assignees the same rights of re-entry "for nonpayment of rent, or for doing waste, or other forfeiture," as the lessors enjoyed. But notwithstanding that Act, an assignee of the reversion cannot take advantage of *every condition* of re-entry, but only those mentioned in the statute, and the words "other forfeiture" mean "other forfeiture of the same nature:" Co. Litt. 215 *b*. No doubt, some trades might affect the reversion, as a slaughter-house, a tan-yard, or a chemical factory. [*Watson, B.*—Is not the question whether this is a covenant which runs with the land?] It is not a covenant within the meaning of the statute 32 Hen. 8, c. 34: it is not ejusdem generis with waste. A covenant will not run with the land, unless it affects the nature, quality, or value of the thing demised, independently of collateral circumstances, or the mode of enjoying it: *The Mayor of Congleton v. Pattison (a)*. Where a lease contained a proviso for re-entry if the lessee should permit any person to inhabit the demised premises who should carry on certain specified trades (that of a licensed victualler not being one), or any business that might be, or grow, or lead to be, offensive, or

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(a) 10 East, 130.

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any annoyance or disturbance to any of the lessor's tenants; it was held that the opening of a public house upon the premises was not within the proviso: *Jones v. Thorne* (a). The mere user of the premises for the purpose of trade is not necessarily an injury to the reversion. An assignee may take advantage of a covenant when he cannot of a condition: *Lucas v. How* (b), *Bac. Abridg. "Covenant"* (E.) 5; *Glover v. Cope* (c).

Overend and *T. Jones*, in support of the rule.—This covenant not only provides for a change in the structure of the buildings, but also for the mode of the lessee's occupation. The circumstance of the lessor not having sued in respect of the alteration of the premises cannot deprive him of his right in respect of the user. *Doe d. Ambler v. Woodbridge* (d) is a conclusive authority that the user of premises contrary to a covenant is a new breach every day they are so used. A covenant by a lessee to insure in the joint names of himself and the lessor is a continuing covenant, of which an assignee may take advantage, although the breach of it has been waived by the lessor: *Doe d. Muston v. Gladwin* (e). The receipt of rent is no waiver of a continuing breach of covenant: *Doe d. Flower v. Peck* (f), *Doe d. Baker v. Jones* (g).—Secondly, this is a covenant which runs with the land. The user of the premises in their altered state necessarily affects their value. In *The Mayor of Congleton v. Pattison* (h), the covenant did not affect the land demised, nor the mode of occupying it: it was a mere collateral covenant which would not bind the assignee though named.

(a) 1 B. & C. 715.

(b) Sir T. Raym. 250.

(c) 3 Lev. 326.

(d) 9 B. & C. 376.

(e) 6 Q. B. 953.

(f) 1 B. & Ad. 428.

(g) 5 Exch. 498.

(h) 10 East, 130.

Temple having referred to the rule obtained by him on behalf of the defendant,

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Overend and *T. Jones* shewed cause against that rule; but the Court having abstained from expressing any opinion upon it, the arguments are omitted.—In reference to the last ground of the rule, they referred to 4 Ann. c. 16, s. 9.

Temple and *Udall* were heard in support of this rule.—They cited *Dumpor's Case* (a); 1 Smith's Lead. Cas. 28; *Fraunces's Case* (b), and the observations of *Popham, J.*, in *Mallory's Case* (c); Shep. Touch. 126.

POLLOCK, C. B.—There is no occasion to express any opinion on the rule obtained by the defendant, because we are all agreed that the rule to enter the verdict for the plaintiff ought to be discharged. We are of opinion that where a breach of covenant has continued for upwards of twenty years, and, with full knowledge of it, rent has been from time to time received, that fact may be left to the jury to say whether they will not presume a licence. It would be strange if a jury might presume a grant from upwards of twenty years' user, and yet be not at liberty to presume a licence. It is a maxim of the law of England to give effect to everything which appears to have been established for a considerable course of time, and to presume that what has been done was done of right, and not in wrong. That, practically, has caused a series of trespasses to constitute a right, so that it might be said a right has grown out of proceedings which are wrongful. But, in truth, it is nothing more than giving effect to notorious and avowed acquiescence. No person would have permitted a covenant to be broken for more than

(a) 4 Rep. 119.

(b) 8 Rep. 89 a.

(c) 5 Rep. 114 b.

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twenty years, unless he was aware that it was broken as a matter of right. It is not necessary, in point of form, to send the case to a jury to find the facts which the Judge may tell them they ought to presume. The rule to enter the verdict for the plaintiff will therefore be discharged.

BRAMWELL, B., WATSON, B., and CHANNELL, B., concurred.

Rule accordingly.

REGULÆ GENERALES.

MICHAELMAS TERM, 1857.

1st.—It is ordered that in Cases of Appeal to a Superior Court under the provision of the Statute 20th and 21st Victoria, c. 43, the 15th and 16th Practice rules of Hilary Term, 1853, so far as the same are applicable, shall be observed.

2nd.—And in Cases when the Appeal is to be heard before a Judge at Chambers, the Appellant shall obtain an appointment for such hearing, and shall forthwith give notice thereof to the Respondent, and shall, four clear days before the day appointed for the hearing, deliver at the Judges' Chambers a Copy of the Appeal.

CAMPBELL.	SAMUEL MARTIN.
A. E. COCKBURN.	R. B. CROWDER.
FRED. POLLOCK.	J. WILLES.
WM. WIGHTMAN.	G. BRAMWELL.
W. ERLE.	W. F. CHANNELL.
E. V. WILLIAMS.	

November 25, 1857.

MICHAELMAS VACATION, 21 VICT.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

MARRIAGE v. THE EASTERN COUNTIES RAILWAY COMPANY and THE LONDON AND BLACKWALL RAILWAY COMPANY.

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Nov. 26.

DECLARATION.—That the defendants were and are by “The London, Tilbury and Southend Extension Railway Act, 1862,” and “The London Tilbury and Southend Railway Deviation and Amendment Act, 1854,” with which the provisions of “The Lands Clauses Consolidation Act, 1845,” and “The Railways Clauses Consolidation Act, 1845,” were incorporated, empowered to make and maintain the railway hereinafter mentioned through the lands of the plaintiff; and that the plaintiff was at the time of the passing of the two first mentioned Acts, and of the making of the railway, and still is the owner within the true intent and meaning of the last mentioned several Acts, of certain

Provisions in the “Lands Clauses Consolidation Act, 1845,” commence, “And with respect to small portions of intersected land, be it enacted as follows.” Section 93, “If any lands not being situate in a town or built upon, shall be so cut through and divided by the works as to leave on both sides, or on one side thereof, a

less quantity of land than half a statute acre,” the owners of the intersected lands may insist on sale, unless such owner have other lands adjoining. By the 94th section, “If any such land shall be so cut through and divided as to leave on either side of the works a piece of land of less extent than half a statute acre, or of less value than the expence of making a bridge, culvert, &c.; and if the owner of such lands have not other lands adjoining such piece of land, and require the promoters of the undertaking to make such communication, then the promoters of the undertaking may require such owner to sell to them such piece of land,” &c.—*Held*, by the Court of Exchequer Chamber, (affirming the judgment of the Court of Exchequer,) that the words “such land” in the 94th section, referred to the words “lands not being situate in a town or built upon” in the 93rd; and, therefore, that the owner of intersected land so situate could compel the promoters of such an undertaking, in an action claiming a writ of mandamus, to make accommodation works for his convenience, pursuant to the 68th section of “The Railways Clauses Consolidation Act, 1845.”—*Erle, J.*, dissentiente.

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lands and premises, &c., consisting of a messuage, yard, buildings, and a garden adjoining thereto, all which said premises were situate in a town within the true intent and meaning of "The Lands Clauses Consolidation Act, 1845:" that the defendants, in pursuance and execution of the powers granted to them by the first mentioned Act, constructed their said railway upon and through the said lands and premises of the plaintiff, and thereby intersected, cut through and divided his said lands and premises, and severed the said *garden* from the said *messuage*, and interrupted the use of, and prevented the plaintiff from using his said garden; and it thereby became and was and is necessary for the purpose of making good such interruption that accommodation works should be made by the defendants, that is to say, a bridge, arch or passage either over, under, or by the side of or leading to or from the said railway, which the defendants at all times well knew: that the part of the said railway passing over the plaintiff's lands and premises has been completed, and that the plaintiff before suit required defendants to make such accommodation works as aforesaid; and although the defendants might and could have made them, in such a manner as would not prevent or obstruct the working or using of the said railway, and although the plaintiff has not agreed to receive and has not been paid, nor have the defendants agreed to give or paid to any person whomsoever compensation for or instead of the making such accommodation works, and although the plaintiff was and is personally interested in having such accommodation works, and has sustained damage, &c.: Yet the defendants have refused, and still do refuse to make any accommodation works whatever, for the purpose of making good such interruption, and have denied and still do deny the plaintiff's right to any accommodation works whatever: that no difference has

arisen or exists, between the plaintiff and the defendants, respecting the kind, or number, of such accommodation works, or the dimensions or sufficiency thereof, or respecting the maintaining thereof. And the plaintiff prays a writ of mandamus to be directed to the defendants commanding them to make such accommodation works as aforesaid.

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Plea.—That after the making and passing of the two first mentioned acts of parliament, the defendants, by a notice dated the 26th of September, 1854, duly given, signed and served, gave notice to the plaintiff that they required to purchase or take for the purposes of the said Acts, and in pursuance of the powers contained in the said Acts, and of “The Lands Clauses Consolidation Act, 1845,” and “The Railways Clauses Consolidation Act, 1845,” or some or one of them, a certain piece of land (describing it as No. 143 in the map, &c.,) which said piece of land so required to be purchased or taken as aforesaid was and is part of the lands in the declaration mentioned: And the defendants thereby demanded from the plaintiff the particulars of his estate and interest, &c., and of the claim made by him in respect thereof, and gave him notice that they were willing to treat for the purchase of the said piece of land, and as to the compensation to be made to him and all other parties interested, for the damage that might be sustained by him or them, by reason of the execution of the works by the said Acts, or some of them authorized to be made, &c. And that, on the 2nd of November, 1854, the plaintiff, by a notice, &c., claimed to be the freeholder of the piece of land and of other pieces hereinafter mentioned, and claimed for compensation a sum exceeding 50*l*.; and that, by another notice, &c., dated the 10th of May, 1855, &c., the defendants gave the plaintiff notice that they also required to purchase or take for the purposes of the said Acts, or some or

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one of them, a certain piece of land or garden ground (describing it as No. 134 on the map, &c.,) which said last mentioned piece of land is other part of the lands in the declaration mentioned: And the defendants thereby demanded from the plaintiff the particulars of his estate, &c.; that the defendants thereby also gave notice that they were willing to treat for the purchase, &c., and as to the compensation, &c. That so much of the piece of land No. 134 as was not included in the second notice, was, or would be, by the execution of the said railway and works, severed from so much of No. 143 as aforesaid as was not included in the said first recited notice (which said severance was and is the intersection in the declaration mentioned): And that the plaintiff required the defendants to make a communication, under the line of railway, between the said last mentioned pieces of land (being accommodation works required by him for the purpose of making good such interruption): *That the said pieces of land, premises, and hereditaments so cut through and divided were not situate in a town or built upon*; and that the plaintiff had not then any other lands adjoining the said part of No. 134, not included in the second notice of the defendants, and which was so severed as aforesaid; and that the said last mentioned part, so severed as aforesaid, was of less extent than half a statute acre, and of less value than the expence of making the said communication, or any such communication, as by any of the said acts of parliament, the defendants were, or would be, compellable to make: that the said part so severed is the "*garden*," and that the said part of No. 143, not included in the first notice, is that which in the said declaration is described as the "*messuage*." That the defendants, by a notice, dated the 30th of June, 1855, and duly served, required the plaintiff to sell to them the severed part of the said piece of land No. 134, and

gave notice that they should include the severed part in their proceedings for ascertaining the value of the land required to be purchased or taken as aforesaid, and should require the jury, or arbitrators, as the case might be, to ascertain by their verdict, or award, the value of the severed part, and also what would be the expence of making such communication as aforesaid. That the defendants having been unable to come to any agreement with the plaintiff for the purchase of the said several pieces of land so required to be purchased, and the amount claimed by the plaintiff being more than 50*l.*, by a notice dated the 30th of August, 1855, being more than twenty-one days after the service of the respective notices, &c., gave notice of their intention to issue their warrant to the sheriff of Essex, requiring him to summon a special jury, for the purpose of determining the amount of compensation to be paid by the defendants for the interest belonging to the plaintiff, &c., and also the value of the severed part of No. 134, and for any damage that might be sustained by the plaintiff, by reason of the execution of the works, and also to ascertain what would be the expence of making such communication as aforesaid; and they thereby gave the plaintiff notice that they were willing to give the sum of 600*l.* for the interest in all the said pieces of land, &c.; and that after the expiration of ten days from the service of the said last mentioned notice, the defendants, in further pursuance of the powers of the said Acts, or some or one of them, did duly issue their warrant, under their respective common seals, to the sheriff of Essex, requiring the sheriff to summon a special jury in compliance with the directions of the said Acts, for the purpose of determining by their verdict the sum or sums of money to be paid by the defendants, for the purchase by them of the estate and interest, belonging to the plaintiff, &c., and also the value

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of the severed part of No. 134; and also the sum to be paid by the defendants by way of compensation for the damage, &c., and by reason of the execution of the said railway and works, &c., and also what would be the expence of such communication. And that the sheriff in obedience, &c., did nominate a special jury, and that all things were done and happened necessary to the holding of the said inquiry, and to the validity thereof; that the inquiry was duly held, the plaintiff being present at the holding of the same, and that the said jurors on their oaths, &c., assessed and determined the sum to be paid by the defendants for the purchase, &c., at 175*l.*, and they assessed the value of the said severed part of No. 134 at 100*l.*; and they found that the sum to be paid by the defendants by way of compensation for the damage that might be sustained by the plaintiff, by reason of the said railway and works, &c., was 125*l.*, and that the expence of making such communication as aforesaid would be 588*l.* And the sheriff then gave judgment for the said sums of 175*l.*, 100*l.* and 125*l.*, amounting to the sum of 400*l.* being less than the sum offered, &c., as aforesaid, and did all things necessary to give effect to the said verdict and judgment. That the costs of the defendants have been duly taxed at 33*l.* 2*s.* 2*d.* And that the plaintiff, although requested by the defendants to make a title, neglected so to do, that thereupon the defendants deposited in the Bank of England, in the name and with the privity of the Accountant General of the Court of Chancery, to be placed to his account there to the credit of the plaintiff, the sum of 383*l.* 3*s.* 11*d.* (being the balance of the said sum of 400*l.* after deducting 16*l.* 11*s.* 1*d.*, half of the sum of 33*l.* 2*s.* 2*d.* allowed for costs), and a receipt was duly given for the same by the cashier of the Bank of England; and so the defendants say that, for the cause aforesaid, they did not make, and were not, nor are bound

by law to make the accommodation works in the declaration mentioned.—Whereupon issue was joined.

At the trial before *Martin*, B., at the sittings in London after Trinity Term, 1856, the defendants proved the plea with the exception of the allegation therein contained, "that the said pieces of land, premises, and hereditaments so cut through and divided were not situate in a town," which allegation was disproved; and it was found by the jury that the said land, premises and hereditaments were situate in a town. Whereupon the learned Judge directed the jury to find their verdict for the plaintiff, and reserved to the defendants leave to move to set aside the verdict, and enter a verdict for them upon the issue raised upon the plea.

In Michaelmas Term, 1856, (Nov. 4), a rule nisi was obtained, to enter the verdict for the defendants, and in the same Term, (Nov. 22), cause was shewn before *Alderson*, B., *Martin*, B., and *Bramwell*, B. *Alderson*, B., having died before any judgment was pronounced; and *Martin*, B., and *Bramwell*, B., differing in opinion, the rule was, in Hilary Term, 1857, (Jan. 31), discharged, in order that the defendants might appeal (a).

Bovill argued for the defendants (b).—The allegation that "the pieces of land cut through and divided were not situate in a town" is immaterial, and the plea is good without it. The 93rd section of "The Lands Clauses Consolidation Act, 1845," is for the protection of landowners; the 94th for the protection of the promoters of such undertakings as are therein mentioned. Many circumstances must

(a) The judgments which had been prepared by *Martin*, B., and *Bramwell*, B., and which were referred to by the Court were not delivered, but were handed to the

parties. See *post*, p. 645.

(b) In Trinity Vacation, June 20. Before *Cockburn*, C. J., *Erle*, J., *Williams*, J., *Crompton*, J., and *Willes*, J.

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concur to enable the land-owner to compel the Company to purchase, under section 93. The object of restraining the application of that section to "lands not being situate in a town or built upon" is, that companies may not be compelled to purchase valuable land which would be useless to them. The word "such," in the 94th section refers to the words "small portions of intersected land," in the general heading prefixed to the two sections. The argument on the part of the plaintiff assumes that the general words of the heading must be qualified. [*Crompton, J.*—It may be, that the legislature did not intend that companies should be enabled to take valuable land not required for the purposes of their undertaking, and therefore limited their powers by the word "such," referring as it naturally does to the last antecedent. *Erle, J.*—Assuming the defendants' construction to be correct, a railway company can never compel a land-owner to sell, because their power depends upon his asking to have a communication made for him.] Section 92 gives a land-owner the power of compelling the company to take the whole of any building or manufactory if a part be taken, and the obligation imposed by the 94th section, assuming it to apply to lands in a town, is therefore only reciprocal. The 94th section contains no enacting words, and in construing it, it is necessary to refer back to the heading for such words: the 94th section must therefore be read as if the heading immediately preceded it. The 93rd and 94th sections are very loosely drawn; the word "lands" is used in the plural in section 93, the word "land" in the singular at the commencement of section 94, and a few lines lower down the word "lands" in the plural, without any apparent reason. The sections not being drawn with grammatical accuracy, a too strict adherence to grammatical rules in construing them would

be out of place. The word "such" in this section, as the expression "such question" in section 39, may be treated as a word having no definite reference. [*Erle, J.*—In *Regina v. The Mayor &c. of Manchester* (a) the Court of Queen's Bench held that, looking at the whole scope of the 16 & 17 Vict. c. 30., the word *such* in the 5th section of that Act must be taken to have no meaning.] In *Falls v. The Belfast and Ballymena Railway Company* (b) the Court of Queen's Bench in Ireland held that the expression "such land" in the 94th section did not apply to lands within a town or built upon. [*Crompton, J.*—The words "in a town or built upon" can hardly be held to include the case of a house built upon a large estate. *Erle, J.*—Unless the Company cut through some portion of a residential building.]

Hugh Hill for the plaintiff.—The construction contended for by the plaintiff is confirmed by the 128th section, by which the Company is empowered to dispose of superfluous lands, if situate in a town, to the best bidder, and need not first offer to sell the same to the person from whose lands they were originally severed. If, therefore, the 94th section is construed as applying to land in a town, it would give to the Company the power of acquiring the land against the will of the owner, at a price fixed by a jury, and of re-selling to a stranger at an increased price. The 94th section contains no limit with respect to the quantity or value of the adjoining land. However small the adjoining piece may be, if the owner possesses adjoining land, the Company cannot require him to sell, but they must make such communications as are required by "The Railway Clauses Consolidation Act, 1845," section 68. Companies should so arrange the level of the railway passing through a town as to give facilities for making communications

(a) 7 E. & B. 453.

(b) 11 Irish Law Rep. 184.

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over or under the line of railway. Unless the plaintiff's construction prevails, the Company will benefit by their own want of care in not making their railway in such a manner as provide facilities for keeping open the communications from one side of it to the other.

Bovill, in reply.—The powers of railway companies in taking land and executing their works are defined by the 6th and 16th sections of "The Railways Clauses Consolidation Act, 1845," by which they are bound to make full compensation to persons injured by their works, and to do as little damage as possible. If the legislature had intended to confine the operation of the 94th section to land not situate in a town or built upon, they would have done so by express words, as in section 128.

Cur. adv. vult.

The learned Judges differing in opinion, the following judgments were now delivered.

WILLES, J.—I am of opinion that the judgment of the Court of Exchequer ought to be affirmed: and in this opinion my brothers *Williams* and *Crompton* concur.

The question turns upon the true construction of the words "such land" in the 94th section of "The Lands Clauses Consolidation Act, 1845," and it is, whether the word "such" has reference to the heading which precedes both sections in these words,—“And with regard to small portions of intersected lands be it enacted as follows;”—or, whether it has reference to the last antecedent which would make sense in the context, namely, land described in the beginning of this 93rd section, by the words “not being situate in a town or built upon?” The latter is the construction at which, after consideration, I have arrived.

In the first place, the word "such," according to the ordinary rule of construction applies to the next antecedent, which will make sense in the context, or, in this case to "land not being situate in a town or built upon."

And I see no reason why the legislature should not have intended to confine the operation of the 94th section as they have confined that of the 93rd, to such land. The 68th section of "The Railways Clauses Consolidation Act, 1845," irrespective of the claim for compensation, gives a proprietor whose lands have been divided a right to such bridge, or other means of communication as may be necessary for the purpose of making good any interruption caused by the railway to the use of lands through which it is made. So far as railways and other undertakings of a like nature are concerned, the 93rd and 94th sections were evidently framed, with a view, on the one hand, to entitle the proprietor, instead of calling upon the railway company to make communications between his intersected lands, where less than half an acre was left him on either side or both, and he had no adjoining land with which the small portion or portions could conveniently be occupied, to call upon them to purchase such small portions; or if he had such adjoining land, then to call upon them to throw such small portions of land into such adjoining lands. This is effected by the 93rd section which is confined in terms to land not situate in a town or built upon, probably because it would operate harshly upon railway companies to be obliged to purchase large and expensive property, such as might nevertheless cover less than half an acre, in towns or places built upon; and also because it might tend, contrary to the policy of the legislature, to enable such companies to become proprietors in towns, for purposes foreign to that of their creation. But, whatever be the reason, the subject-matter dealt with in the 93rd section throughout, is land "not

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situate in a town or built upon." Then follows the 94th section, commencing, "If any such land," and it goes on to provide for a case not provided for by the 93rd section, namely, the case of land being divided so as to leave on either side a piece of land of less extent than half a statute acre, or of less value than the expence of making a communication, where the proprietor requires the Company to make such communication. In such case, it enacts that the Company may require the proprietor to sell. This section, by analogy to the 93rd, deals with the case of land of such small value, that half an acre, or more of it, may not be worth the expence of making a communication; not merely "small" as to size, but "small" as to value also; and so far from there being anything absurd or incongruous in saying that its operation should like that of the 93rd section, be confined to lands "not in a town, or built upon," it appears to be strictly in conformity with the principle of the 93rd section, that whilst, on the one hand, the Company ought not to be forced to purchase, under that section, near upon half an acre of land in a town, which might absorb a large portion of their capital, so, on the other hand, under the 94th section, they should not, in like circumstances, be enabled to compel the proprietor, either to sell to them, or to make a communication for himself. The heading, which precedes both sections, refers to "small portions of intersected land." But "small" is a word of comparison, and a piece of land less than half an acre which, if not situate in a town or built upon, would generally be of moderate value, might in a town represent a considerable fortune. It seems therefore not an unimportant circumstance, that the same quantity, viz. half an acre, is referred to in each section as the limit of smallness, while in the 94th section is added, "*or of less value*" than the expence of making a bridge &c., referring to land of which half an acre or

more may be of less value. These latter circumstances seem to me strongly to indicate that the subject-matter dealt with by the 93rd and 94th sections, is the same.

I may add that the legislature has, by the 93rd section, carefully guarded the Company from being obliged to purchase in towns or places built upon, and has, in that section, treated half an acre in a town as not being a "small" portion of land. Is it not probable that a similar protection should have been intended to be given to the proprietor in a town, it may be of building land in which he has invested his money, and which he prefers to keep for the sake of its increasing value, or of a row of houses, or of a manufactory, through which a railway may run causing loss and inconvenience if there be no communication, and possibly a ruinous loss, if the Company, upon being required to make a communication, can compel a sale? There seems no greater reason for withholding from the proprietor in the 93rd section, the right of compelling a purchase, under such circumstances, than in the 94th section, for withholding from the Company the power of compelling a sale.

It is no answer to say, that the legislature trusted to the Company not being likely to take so unreasonable a step. Without, however referring to the possibility of their abusing the power, in order to deter the proprietor from requiring communications, under "The Railways Clauses Consolidation Act, 1845," section 6, it might in many cases well be worth their while to exercise it, either for the acquisition of more land than their Special Act authorises them directly to take under ordinary circumstances, or because they might wish to do so for an advantageous investment.

It appears from the general heading of sections 93 and 94 that the legislature meant to interfere only where the

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separate portions of land were "small." And to allow the Company the power to compel a sale under section 94 where the quantity of land though small in size yet by reason of its situation in town or being built upon, is probably and usually great in value, would, as it seems to me, clash with the declared intention of the statute.

There are some other observations to be made as to the use of the word "such." That word seems more properly to apply to the sort of land, as, in town or country, built upon or not, than to the "small portions of intersected land." Accordingly, it is not used in the introductory part of the 93rd section, which commences "if any lands" &c., not any "such" lands. And, if the 94th section was intended to apply to all intersected lands, it might have commenced in like manner as the 93rd, "if any land, &c.," in which case, and without the word "such," it would have applied to all intersected land whether in town or country and whether built upon or not. So that the word *such* in the phrase "if any *such* land" is superfluous and useless if it refer to the heading, or intersected lands generally, whilst full meaning is given to it, if referred to the land dealt with in the 93rd section, and there described as "not situate in a town or built upon."

According to familiar rules of construction, therefore, viz. that the grammatical construction should be adopted unless it give rise to some manifest injustice or incongruity with the other provisions of the Act, and that such construction should be adopted as gives meaning and effect to all the words, rather than one which leaves one or more of the words without meaning or effect, I am of opinion that "such" land in the 94th section, means "land not situate in a town or built upon."

As to the case cited from the 11th Irish Law Reports, it was not necessary there to give any opinion upon this

point. The land intersected was "not in a town or built upon," and the observations of the two learned Judges upon this subject do not appear to have been much considered, and were extrajudicial. The point has been distinctly raised for the first time in the present case, and the elaborate opinions of the learned Judges in the Court below were at variance with one another. The only safe course in this state of the authorities, was carefully to consider the statute itself, and, having done so, I have arrived at the conclusion already expressed, agreeing with that of my brother *Martin* (a), according to whose opinion the judgment of the Court below was entered for the plaintiff.

In my opinion, therefore, the judgment of the Court of Exchequer was right, and ought to be affirmed.

ERLE, J.—In this case the question is, whether s. 94 of 8 & 9 Vict. c. 18, relates to such intersected land as is comprised within the head to this part of the statute, or to such intersected land as is comprised in s. 93, viz., such as is not situate in a town or built upon.

The statute is divided into parts, under separate heads, and all the sections relating to one head are intended to be comprised in the part to which it is prefixed. The head to the part in question is "small portions of intersected land." The part under this head comprises two sections only, 93 and 94. Section 93 begins, "If any lands, not situate in a town or built upon, be intersected," &c.; and section 94 begins, "If any such land," &c.

The plaintiff contends, that "such land" in section 94, grammatically means land before described; and that the

(a) See *post*, p. 645.

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word "such" would be superfluous, unless it meant land not situate in a town or built on.

But if the construction is to be merely grammatical, "such land" refers to the land last mentioned, and that is "land adjoining" intersected land mentioned at the close of s. 93; and if it meant land not situate in a town or built upon it is still superfluous; for, then, this part would relate entirely to intersected land not situate in a town or built upon, and the words "not situate in a town or built upon" ought to be in the general head to the part, and not in the first section, carried on into the second section by the word of reference "such."

But the context and the purpose of the enactment are more important guides than mere grammatical rules in deciding which of two constructions accords with the intention of the legislature. Accordingly, the plaintiff argues that the legislature thought that the rights of urban proprietors should be more protected than those of rural proprietors, that some urban proprietors might wish to pass in a straight line from the land on one side of the railway to the small portion on the other; and the land situate in a town was excepted from s. 94 to gratify this possible wish.

The defendants contend that it is absurd to imagine that the legislature intended a partial protection to one class of proprietors in preference to another. That the notion that landowners in a town have more interest in visiting a small portion of intersected land than landowners in the country, is unfounded.

The legislature assumes that compensation may be made for any land that is taken, and this statute, with others, is a code for adjusting the taking of land and the making of compensation for it. Many rights of private owners are

sacrificed to the public interest in a great work, on condition of adequate compensation being made; and this compensation is to be measured by the market value of the land taken and the damage done, not by individual caprice, or according to any *pretium affectionis*.

The general rule is, that the company's power to take should be limited to the need for the railway, but the sections 93 and 94 extend that limit: Section 93, for the benefit of the landowner: Section 94, for the benefit of the company.

Section 93 applies to portions of land less than half an acre cut off by a railway from a larger property, so as to be inconvenient for occupation with a railway interposed. Here, the landowner may compel the company to purchase this portion, if it be not in a town, or built on. This right is confined to rural land, probably because the inconvenience would be felt only in farming. In a town the need of communicating from one house to another across a railway in a straight line rather than circuitously by a street is slight. Gardens in a town so large as to be intersected by a railway are rare, and the value of land in a town for building ground may be very great. Therefore the right in the landowner to compel the company to purchase a small intersected portion was confined to rural land. Section 94 is for the protection of the company against the enactment in the Railway Clauses Act, requiring communication to be made between intersected portions of the same estate. It is entirely a protective enactment, protective of the company. It cannot come into operation unless the landowner requires the company to make a communication across the railway, between intersected portions. Then, if such portions be less than half an acre, or if the value be less than the value of the communication, the company may require a sale of the portion and so

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save the waste of making a private communication. The defendants contend that this right is given in respect of all lands; the plaintiff contends that it is given only in respect of rural land, and that urban land is excepted; but he gives no reason, beyond that above mentioned, for supposing that urban proprietors were specially favoured, and that the legislature, taking notice of the instances, comparatively rare, in which the severance would be of a garden from a house or the like, would not only in these instances secure the privilege of a straight passage by a private bridge, but in all other instances where there should be a severance, give the landowner either the power of inflicting a penalty by requiring a costly communication, or the option of using this power as a means of extortion.

It is probable that this power of compelling a sale is most needed in a town, as the land in a town is more often held in small portions, so that there might be many severances in a small space and each proprietor might require a bridge for himself.

If the land in a town had been disposed of in building allotments so that there might be many portions severed less than half an acre and many other portions severed less than the value of a bridge, it would be unreasonable to require a separate bridge for each small portion; and the section protects, by enabling the company to purchase where a communication is required, and it does not enable the company to oppress by taking valuable land to be kept for their own purposes, because they must sell all land which is not wanted for the railway.

Upon this review it seems to me that the defendant is right in his contention for the reasons he has assigned, and that the judgment below ought to be reversed. I agree with my brother *Bramwell's* opinion in that Court (a), and with that of the Judges in the case cited.

(a) See *post*, p. 649.

COCKBURN, C. J.—I agree in the conclusion arrived at by my brother *Willes* that there should be judgment in this case for the plaintiff, but not altogether concurring in the whole of his reasoning on the policy or purposes of the sections we are called upon to interpret, I will briefly state the ground on which my judgment proceeds.

The question turns upon the combined effect of sections 93 and 94 of the Act 8 & 9 Vict. c. 18, taken in conjunction with the preamble by which those sections are introduced. Upon these enactments the question arises whether the words “such land” at the commencement of section 94 are to be taken to relate to the lands referred to in section 93 which immediately precedes, in which case it must be confined to land situate within a town or built on, or whether they are to be taken as referring to the larger language of the preamble which speaks generally of intersected land, without restriction to lands within a town or built upon. Now, according to the ordinary rule of construction, the word “such” should be taken to relate to the last antecedent, unless it plainly appears from the context that such a construction would be absurd or repugnant to the purpose of the legislature. Much argument has accordingly been used to shew that such a construction would be impolitic and unjust, and it has been urged, and with much effect, that the same necessity exists for preventing in towns, as in the open country, an idle waste of money in the construction of communications exceeding in cost the value of the severed land. On the other hand it is contended that the intention of the legislature was equally to confine the provisions of both these clauses to severed lands in the country; that both relate to severed land of less than half an acre in extent; and that in the country half an acre is, with reference to the quantity of land usually held, a very minute quantity, while in a town it may

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comprehend property comparatively of very great value. To this argument again it is replied, that where intersected property in a town is of such greater value, its value would always exceed the cost of the communication to be constructed, and so the necessity for the protection of the 94th section would not arise.

I must confess that so far as the arguments derived from expediency are concerned, the reason of the thing appears to me to be on the side of the defendants. It is difficult, I think, to find or suggest any sufficient ground why it should be left in the power of any capricious or rapacious proprietor to compel a company to go to an expense greater than the value of the land, when they are willing to pay the price of the land itself, because the land happens to be in a town instead of in the country. Yet, after a careful consideration of these sections, I cannot bring myself to think that we should be justified in holding the words "such land," in the 94th section, to refer to any other than the land treated of in the section immediately preceding. Both sections deal with severed land of the same extent, namely, of less extent than half a statute acre. The two sections are corresponding and correlative. The 93rd provides for cases in which the owner of property shall be entitled to call upon the company to buy the severed land. It was to be expected that this would be followed by a corresponding provision as to the cases in which the company might compel the proprietor to sell; and accordingly the 94th section follows for that purpose.

It would, under such circumstances, be reasonable to presume, if nothing appeared to the contrary, that the second of these sections was intended to apply to lands of the same character as these referred to in the first; but that presumption becomes infinitely stronger from the fact that lands of a specific character having been dealt with

in the first section with reference to one set of rights, the succeeding section uses the term "such lands" in fixing the corresponding and correlative rights of the opposite parties. I am not insensible to the observation which arises upon the language of the preamble to these sections, the terms of which being quite general, when they might have been restricted to "land in a town or built upon," fairly give rise to the argument that the legislature did not intend to confine both sections to land so circumstanced; but I cannot think that this argument is sufficient to overcome the ordinary rule of construction; and it may be with equal force observed on the other side that, if the ordinary construction had been meant to be departed from, it would have been expected that words would be added in the 94th section to make the meaning of the word "land" larger than in the 93rd, and co-extensive with the language of the preamble. I see nothing, therefore, to satisfy us that those who framed, or those who passed this statute, intended to do more than legislate with reference to land not situated in towns or built upon, or to warrant us in departing from a common and well known rule of construction. I regret to arrive at this conclusion; I fear it may leave companies exposed to unreasonable or extortionate demands; but I think the proper remedy for such a mischief, if likely to arise, is by further legislation, and not by a judicial exposition which the language of the Act, as construed by sound and established rules of construction, will not warrant.

Judgment affirmed (*a*).

(*a*) The following judgments were written (see p. 631) by *Martin, B.*, and *Bramwell, B.*:—

MARTIN, B.—This is an action of mandamus under "The Common Law Procedure Act, 1854," brought by the plaintiff to compel the defendants to make a communication between two parcels of land

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belonging to him, which have been intersected by one of their railways. The declaration is framed upon the 68th section of "The Railways Clauses Consolidation Act, 1845," (8 & 9 Vict. c. 20), which enacts that the Company shall make and maintain a communication over or under the railway, to make good the interruption caused by it to the use of the lands through which it is made. The defendants, (amongst others), pleaded a plea founded upon the 94th section of "The Lands Clauses Consolidation Act, 1845," (8 & 9 Vict. c. 18), and there was an averment in it that the lands "were not situate in a town or built upon."

The issues were tried before me at the sittings at Guildhall after last Trinity Term, when it was proved that the lands were in the town of Leigh, in Essex; that the plaintiff had a house in a street there, with a yard and garden behind—in all, less than half an acre, and that the railway had been made upon part of the yard and garden, cutting off the house from the remainder of the garden; and the communication claimed was one to connect the parts so severed. It was perfectly clear on the evidence, and is now not disputed, that the premises were all in the town of Leigh, but it was alleged by the learned counsel for the defendants that the averment of their not being in a town was immaterial, and that the 94th section had reference to land everywhere in town or country, and whether built upon or not, and I was requested to direct the verdict upon the issue on this plea to be entered for the defendants, all the other averments contained in it being said to be proved. I declined to do so, and a verdict was entered for the plaintiff; but I gave leave to move to have the verdict entered for the defendants.

A rule was granted for this purpose, and it has been argued upon cause being shewn against it. The question entirely depends upon the construction of the words "such land," in the first line of the 94th section of "The Lands Clauses Consolidation Act, 1845." According to the rule of construction now universally adopted and approved of, these words are to be construed according to their plain, popular, ordinary, grammatical sense, unless this be at variance with the manifest intention of the legislature, to be collected from the statute itself, or be plainly absurd or repugnant. The words "such land" are relative, and, according to the common rule, relate to the next antecedent, and that antecedent manifestly is "lands not situate in a town or built upon." To this antecedent the reference is quite natural and intelligible, whilst to the more remote one, viz., the words "with respect to such portion of intersected land" in the preamble, the reference seems scarcely sensible. I am unable to see that this

construction is contrary to the intention of the legislature. Indeed, my impression rather is that it is what was meant to be expressed. Then is it either absurd or repugnant?

By the 68th section of "The Railways Clauses Consolidation Act, 1845," a general obligation is imposed upon railway Companies to make communications between intersected lands, but it was very reasonable that some restriction or qualification should be put upon the right where the portion or portions severed were small. For this purpose the legislature enacted the 93rd and 94th sections of "The Lands Clauses Consolidation Act, 1845," and the quantity of land which they adopt as the small quantity is half a statute acre.

In country places, half an acre is a small quantity—it is a very minute part of most modern farms, and in relation to their ordinary size may truly be deemed a small portion, but in relation to property belonging to individuals in towns, half an acre of land is a large quantity, and in very many towns, such as London, Liverpool, Manchester, Bristol, Leeds, Bradford, and very many others, half an acre of land would be and is a very considerable property, and it therefore seems to me by no means absurd in the legislature to except lands in towns from the operation of the 94th section. Taking into consideration the constantly increasing value of building land in towns, they may reasonably have thought it right to give to the owners the right to require a communication to be made in all cases where a severance was effected by a railway company, notwithstanding the present value of the land severed was less than the expence of making the communication, and the railway company has no just right to complain. They for their own pecuniary advantage take other people's land against their will, and it is no hardship that in towns where land may become building land, they should be compelled to make a communication between severed portions, and so put the owners, as nearly as may be, in the same position as if their land had not been inter-meddled with. The two sections seem to me to be directed to two cases and provide for both. The 93rd for the case where the owners require the promoters to purchase; the 94th to the case where the owner requires a communication to be made; but, in both, I think, lands situate in towns or built upon are excluded; and as to such, that the obligation created by the 68th section of the Lands Clauses Consolidation Act continues, and is not affected by either of them. I should not have entertained much doubt upon this construction, except that my brother *Bramwell* has arrived at a different conclusion, and that there is a case in the Queen's Bench in Ireland—*Falls*

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v. *The Belfast and Ballymena Railway Company*, (11 Irish Law Rep. 184),—in which the Lord Chief Justice *Blackburne* expresses an opinion, that the words “such land” in the 94th section, have not reference to land in a town or built upon, but are to be construed by reference to the preamble to the two sections. Mr. Justice *Crompton* expresses himself as not quite satisfied, but does not differ from the two other Judges; and Mr. Justice *Moore* says that the point is one of doubt, but agrees with the Chief Justice, and gives his reasons for so doing. I entertain the most sincere respect for the opinions of these two most learned Judges, and for my own part would be prepared to act upon a judgment of the Court of Queen’s Bench in Ireland as upon that of one of the Courts at Westminster Hall, and if the point now in question was the same as there adjudicated upon, I would give my judgment for the defendants and leave the plaintiff to bring a writ of error; but I think the expression of opinion in that case was extra-judicial, and would not be binding upon me if it occurred in the judgment of one of the superior Courts in this country.

It appears from the mandamus that Mr. Fall’s lands were not in a town or built upon at all, in the obvious sense of the 93rd section: on the contrary, they were lands in the country, on the banks of the Belfast Lough, on which Mr. Falls had built a dwelling-house and offices, and clearly not lands built upon within the meaning of the 93rd section. The opinions of the two learned Judges were therefore, of necessity, extra-judicial upon the present point. Mr. Justice *Moore* seems to think that the two sections were intended exclusively for the benefit of the Company or promoters: it strikes me they were intended for the benefit of the owner as well. It was also argued on behalf of the plaintiff, that the plea was bad, and if so, the verdict for the plaintiff ought to stand, as all the averments in a bad plea must be proved to entitle the party pleading to have the issue of fact found for him. It is not necessary to give any opinion upon this point, but my impression is, that when the two severed portions do not amount to half an acre, the value of both, and not of one as compared with the expence of making the communication, is the true test provided by the 94th section.

I cannot avoid observing, that the construction which I give to this section is that which the defendants have put upon it in their plea, and if it was the opinion of their legal advisers that the averment was not material, they would have done much better to have omitted it and left the plaintiff to demur, especially as there is another plea

in which an averment in the declaration, that the lands were in a town or built upon, was traversed. Such mode of pleading casts a very unfair burden upon a Judge sitting at Nisi Prius.

BRAMWELL, B.—The case between these parties is as follows:—The defendants, under the powers of their Act, have taken a portion of the plaintiff's land, and paid him for it. But the portion so taken leaves a piece on either side, and the plaintiff has required the defendants, as by law they are bound to do, to make a communication between the severed pieces. The defendants admit they would be liable to do this, but that one of the severed pieces is of less value than the expence of making a communication, and they claim to buy the piece so of less value. The plaintiff admits that the piece is of less value than the expence of making the communication; that is to say, that the piece of land with the communication made, and considered independently of, or in connexion with, the other piece, will be worth less than the expence of the communication, so that it would not be worth the plaintiff's while to make it; and admits that if it were not in a town the defendants would have the right they claim. But he says that this bit of land being in a town, it matters not that its value is less than the expence of making a communication with the other bit, and that the defendants must spend 700*l.* to procure him a value of 100*l.*, and he insists that by law they are bound to, and shall do so.

Now, undoubtedly, if we had not the written law before us to interpret, and if we were only speculating what was or ought to be law, there would be no difficulty in deciding with the defendants. The plaintiff's contention is, that there shall be a sheer waste of the difference between the cost of the communication, and the thereby additional value of the divided piece,—a waste as complete as though the same number of sovereigns, or as much wheat as they would buy, should be flung into the sea; and when a reason is asked for this, the only answer is a reference to the rights of property: and surely never were those rights more unreasonably invoked than here. It is not necessary to say that they only exist for the public good; but it is at least certain, that in this country landed property is subject to the right of the public to take such part as is required for purposes of a public character, on giving a compensation to the owner; and that right having been exercised in this case as to a portion of the plaintiff's land, what is to exempt the patch in question from the same considerations as applied to the land it was separated from? But the topic becomes ridiculous when it is considered that, by the plaintiff's

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admission, the defendants would be in the right if the land were not in a town; as it will hardly be said the rights of urban property are more sacred than those of rural. Why, then, should there be this waste by the law of the land? As the wealth of the community is made up of the wealth of individuals, why should so much of the national means be thrown away? Why should the defendants be punished for undertaking a work "of great public benefit," as their Act recites? Even if they should be, it would be better to put the fine into somebody's pocket, than throw it away as is here proposed.

Arguing, therefore, *a priori*, I should not doubt that the defendants were in the right. But our task is not to speculate, but to interpret the written law, and the only use of considering what ought to be the law is to assist us in interpreting what it is, when its words are doubtful. Now the question arises on the 8 Vict. c. 18, sections 93 and 94, which are introduced with these words, "And with respect to small portions of intersected land, be it enacted as follows." The first of these two sections provides that where a piece of land not in a town or built on, and less than half an acre, is separated and cannot be conveniently added to other property of the same owner, the Company shall be compelled to buy it. This clause is entirely for the benefit of the landowner, giving him a right to compel the purchase of a small piece of land which could not be conveniently thrown into any other property of his, and it was reasonable to restrain his power of compelling such purchases to land not in a town or built on, because otherwise there would be a power of compelling the promoters of such undertakings to buy properties of large value, without any sufficient reason for the same. For, by section 92, no one is bound to sell part of a house or building, and where a whole house or building is left, or any number of them, then the promoters are bound to make communications, so that in a town or land built on, there never can be the inconvenience to the landowner of his being left with part of a house, or with a house inaccessible; and a single house is as capable of useful occupation as one of a row of twenty; but a detached half acre of land is not so capable of profitable occupation as if it formed part of a larger piece. There is therefore a reason for making the promoters buy small pieces of land not built on—none for making them buy such pieces built on, but reasons why they should not be bound to do so.

Section 94 is entirely different in its object. It enacts that where a piece of land less than half an acre, or of less value than the expence of making a communication, is cut off, and the owner has no adjoining land, then the promoters, if required to make the communication, may

purchase the land. This is for the benefit of the promoters, and the general object I have already mentioned, viz., that while on the one hand it would be inconvenient to the landowner to have any land, much or little, on one side of the railway, without communications with land on the other, it would, on the other hand, be a waste to compel the making of communications where the land to be communicated with was not worth the expence of the communication. Now, why is not this applicable to land in a town, or built on? Why should there be a waste and loss in respect of such lands which are avoided as to others? It is said there is no one can tell the value of land in a town, it may, in a few years, be tenfold its present value. The answer is, a thing is worth what it will fetch, and no more. It may be unfortunate, but the legislation on this matter is necessarily of the hardest and most unromantic and unspeculative character. The legislature can only provide for a present money compensation for the present money value of the land if brought into the market, (with the qualification I shall presently mention) and of that value the future prospects of the land are a part. It matters not that the owner takes a more sanguine view; he gets no greater price, any more than he would because his ancestors had lived there 500 years, or because, for any other reason, he put a fancy value on it. But it is said that if land built on in a town is within section 94, the promoters might buy half an acre covered with houses; there are not many such half acres belonging to one owner, but if there were, I see no difficulty, as it is a power which will never be exercised, and therefore may be safely given. The promoters always pay more than the worth of the land. I do not mean owing to the unfairness of juries, because the statutes must be construed on the supposition that they do their duty, but the promoters properly pay more than the value. The value is what they could sell it for to a willing purchaser buying of a willing seller; but they buy of an unwilling seller, who always receives, and properly, a compensation for the compulsory sale. Surveyors commonly put this at 20 per cent., and a committee of the House of Lords has recommended 50 per cent. It certainly always ought to be, and always is, something, because an unwilling seller does not get a compensation in the market price, any more than a man who had just bought a horse for 50*l.*, because he preferred the horse to the 50*l.*, would get compensation, if that horse were taken from him and 50*l.* given to him. The promoters therefore always give more for land than they can get for it, consequently never buy more of it than they can help. The reason of section 94 then applies to land in a town and land built on, and there is no reason why it should not comprehend

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such lands. Moreover, it seems to me, the words of the statute are in accordance with what I consider the reason and object of it. Section 94, standing alone, is unqualified, and applies to all lands, and I think it must be read as though introduced by the words, "And with respect to small portions of intersected lands be it enacted as follows." The customary mode of introducing a separate head of enactment at the beginning of a section is to say, "And be it enacted;" this may be seen in the other statutes of the same year, and in this statute itself, where miscellaneous clauses occur as at sections 133, 134, 135, and others; and though in the statute where there is a series of clauses on one subject there is a general heading, still those words, "and be it enacted," are to be read as introducing each section, otherwise there are not the customary words of enactment, and section 94 states as a fact, and affirms, not enacts, that the promoters may buy, &c. But if so, then each section is "enacted," "with respect to small portions of intersected lands" generally and without exception, and the word "such," in section 94, refers to all such land. It is said, the word "such" means "not so situate." If so, the word is wrongly used, as "such" means "of that kind, or the like kind," "the same," "that comprehended under the term premised," (Johnson's Dictionary) and not the situation of the thing spoken of. It is said, on the other hand, that if it means "intersected," it is tautologous, for then the enactment would be, "and with regard to intersected land, be it enacted if any intersected land." If so, at the outside, that is only inelegant, while the other use of the word is inaccurate. But the objection is unfounded; the expression would be tautologous if the words were so placed, but they are not. The same reasoning would shew, that "such" is always needless. On these grounds, I think that the reason and language of the statute are alike in the defendants' favour, and accordingly, and on the authority of *Falls v. The Belfast and Ballymena Railway Company* (11 Irish Law Rep. 184), I am of opinion the defendants are entitled to judgment.

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IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

MUGGLETON v. JOSEPH BARNETT and Another.

Nov. 26.

IN this case (reported, 1 H. & N. 282), the Court of Exchequer having given judgment for the defendant, the plaintiff took proceedings in error thereon, and the case was argued (*a*) in Hilary Vacation 1857.

In ejectment for copyhold premises, the plaintiff claimed as customary heir in Borough English of E. M., who purchased the premises in 1772. Upon the death of E. M. in 1812, the premises descended to his two infant grand-daughters, as co-parceners. One of them died unmarried and was succeeded in her moiety by her sister who, in 1836, married the defendant. She died in 1838, leaving one son, to

Mundell, for the plaintiff.—There are three grounds upon which the plaintiff is entitled to retain the verdict entered for him.—First, he is heir according to the custom to the *purchaser*, upon the death of the person last entitled, within the meaning of the Inheritance Act, 3 & 4 Wm. 4, c. 106, s. 2. Secondly, the plaintiff is entitled to recover as customary heir upon failure of issue in the person last entitled. Thirdly, there was evidence of the existence of a custom, whereby the youngest nearest male kinsman, *ad infinitum*, was entitled to inherit.—The first point depends on the construction of the 2nd section of The Inheritance Act,

whom the premises descended, and who died in 1854, without issue, and was the person last seised. It was proved that lands in the manor descended lineally to the youngest son of the person last seised, *ad infinitum*, and if no son to the daughters as co-parceners; if no lineal heirs, to the youngest brother of the person last seised, and to the youngest of such youngest brother; and if the youngest brother died without issue, to the next youngest brother; and if no brother then among the sisters as parceners. There was also an entry of descent and admission of the youngest son of an uncle, and of the youngest sons respectively of two sisters, heirs of the person last seised. The plaintiff was the youngest son of the youngest brother of E. M. the purchaser.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the custom did not extend to so remote a collateral relation as the plaintiff: *Per Coleridge, J., Wightman, J., Cresswell, J., Crompton, J. (Cockburn, C. J., Erle, J., and Williams, J., dissentientibus).*—Also that the Inheritance Act, 3 & 4 Wm. 4, c. 106, s. 2, did not affect the custom of descent in the manor.

(a) Feb. 6 Before Cockburn, Cresswell, J., Erle, J., Williams, C. J., Coleridge, J., Wightman, J., J., and Crompton, J.

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3 & 4 Wm. 4. c. 106. Edward Muggleton, who died in 1812, intestate, was the purchaser for value of the land in question, and from him to Brian Barnett (the son of the defendant and the person upon whose death these proceedings originated) there was a series of descents or heirships: the question therefore arises, what effect, if any, has the statute in designating the *propositus* in the table of descent, upon failure of heirs in the descending line from the person last seized? The words of the second section are, "that in every case the descent shall be traced from the purchaser;" and by the interpretation clause the words "descent" and "purchaser" have an artificial meaning: "descent" means the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be child or issue; and "purchaser" means the person who last acquired the land otherwise than by descent or escheat, and certain other modes there specified, not material to this question. The latter part of the section points out who shall be deemed presumptively to be the purchaser, viz., that in every case the person last entitled shall be deemed such, until the contrary, or rather that he took as heir, is shewn; and so toties quoties. Before the passing of this Act, descent was always traced from the person last seized. The maxim "*seisina facit stipitem*" (which seems to have been introduced into the English law as early as the time of Bracton), had universal application in designating the *propositus*. *Primâ facie* the heirs general of the person last seized were entitled to inherit, upon the assumption that all were of the blood of the purchaser; but if it could be shewn affirmatively by evidence that any branch of ancestors, either in the male or female line, were not of the blood of the purchaser, then such line was for ever excluded from the succession.

There were difficulties in proving a seisin either in law or in fact; and the object of the legislature was to establish one uniform rule, whereby the blood of the purchaser should in all cases be preferred, by ascertaining upon a definite principle who the purchaser was, and, in so doing, the maxim "*seisina facit stipitem*" has been virtually abolished: Sugden's Vend. & Purch. p. 555, 11th edit.; Shelford Real Prop. Stat. 408; Stephen's Comm. vol. 1, p. 397, 4th ed. Indeed, the last named author enunciates the following as the first canon of descent: "In every case the descent shall be traced from the purchaser," and this by way of substitution for the first canon of Blackstone: Black. Com. vol. 2, p. 208. Is, then, the direction of the statute obligatory? If so, supposing this was a descent at common law of lands in socage, there could be no doubt that the heir to be sought would be the heir of Edward Muggleton, the purchaser, who died in 1812: and if that be not so, and if under the fifth section of the Act, the heir of Bryan Barnett, the person last seized is to be sought for, then the defendant, being his father, is entitled as the heir of his son. [*Hayes*, Serjt., stated that he did not claim for the defendant as heir in any case, but that the descendants of the elder brother of the plaintiff's father were the heirs.] Assuming this to be so as regards lands in socage, is there any difference with respect to copyhold lands of Borough English tenure? By the Inheritance Act, "descent" means the title to inherit lands. "Title," in its largest sense, is thus defined by Lord *Coke* (a), "*Titulus est justa causa possidendi id quod nostrum est.*" Johnson, in his Dictionary, defines it as "a claim of right." "To inherit" is to take as heir; and, by the interpretation clause of the Act, the term "land" extends to all hereditaments, whether corporeal or incorporeal,

(a) Co. Litt. 345, b.

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and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough English, or any other custom." The rule, therefore, is equally applicable to copyhold lands, held either in borough English or under any other custom. Then, upon the custom as found, the plaintiff is the customary heir of the purchaser, being the youngest son of his youngest brother; the Act having substituted the purchaser, as the *propositus*, for the person last seized. But it will be argued that the custom is to be construed strictly; and the custom says, "heir of the person last seized." The same objection was taken, *arguendo*, in *Clements v. Scudamore* (a), and disposed of by *Holt*, C. J.: moreover, seisin was never an integral part of the custom, but was introduced into copyholds by analogy to the general law: *Reeve's Hist. of English Law*, Vol. 3, pp. 158, 312. The only cases on this section of the statute are *nisi prius* decisions. In *Doe d. Blackburn v. Blackburn* (b), which was tried at York, in 1836, before *Parke*, R., lands had been purchased by a bastard; and his son, upon the father's death, entered as heir and died without issue: the question was whether the lessor of the plaintiff, who was his heir *ex parte maternâ*, was entitled to recover against the person in possession, or whether the descent, being traced from the purchaser, the father, who was illegitimate, there was an escheat. The learned Judge said, that there was no getting over the language of the 2nd section of the Inheritance Act, though the case could hardly have been contemplated by the framers of that Act. The reporter indeed says, in a note (c), that there would have been an escheat at common law: that may be so, but this case is approved of by Lord *St. Leonards*, *Sug. Vend. & Purch.* p. 551. 11th ed. The

(a) 1 P. Wms. 63.

(b) 1 Moo. & Rob. 547.

(c) P. 549.

difficulty which arises in this case, upon the construction and application of the 2nd section of the Inheritance Act, has its origin in an alteration of the bill in its passage through the legislature. As the bill originally stood, descent was to be traced in all cases from the person last entitled whether seised or not: Sug. Vend. & Purch. p. 555, 11th ed.; but the 2nd section was introduced by way of substitution, in the House of Lords. One of its consequences is to create a difficulty as to the rights of the descendants of heirs of parceners who succeeded as heirs to such parceners: did such heirs take the parcener's entire share or only an aliquot part of it with the other parceners as heirs of the purchaser? Before the case of *Cooper v. France* (a) the latter opinion prevailed among conveyancers: Bythw. and Jarm. Conv. by Sweet, vol. 1, pp. 139, 140; but in *Cooper v. France*, which was a suit for a partition between the sons of two parceners, who were heirs of their father, *Shadwell*, V. C., held that the sons took moieties, each taking their mother's shares respectively. This decision proceeded chiefly on the ground that in that case there was no necessity, as contemplated by the latter part of the section, to carry back the pedigree to the grandfather, the purchaser. This case has been since followed; but, even if good law, it is distinguishable from the present and has no bearing upon the argument, since here the circumstances require the pedigree to be carried back to the purchaser, or rather to his father, as the nearest common ancestor. *Cooper v. France* relates to the rights of the descendants of those last entitled, the present case to the rights of collaterals of a given common ancestor. *Paterson v. Mills* (b) may be relied on by the other side, but that case depended upon events happening before the 3 & 4 Wm. 4, c. 106, was in operation. That statute had for its object the establishing one uniform rule of descent,

(a) 19 L. J. Chan. 313.

(b) 19 L. J. Chan. 310.

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and that can only be done by making the purchaser, when ascertained as directed by the latter part of the 2nd section, the propositus in every case without exception.

Secondly.—The plaintiff is entitled to recover as customary heir upon failure of descendants of the persons last entitled; because, whenever upon failure of issue in any given line it becomes necessary to resort to a common ancestor, however remote, the heir of the common ancestor must of necessity be also the next kinsman, and so heir to the person upon whose death the descent was cast. [*Cockburn, C. J.*—And that is a convertible proposition]. The only exception is that of the half blood, which does not apply here. In this case, in order to find the nearest collateral kinsman, it is necessary to ascend to the father of Edward Muggleton, who died intestate in 1812. He is the first common ancestor, and in the descending line there is Peter Muggleton, the youngest brother of the intestate and father of the plaintiff, who is his youngest son. The truth or falsity of this general proposition depends upon the following passage in Blackstone's Comm. vol. 2, p. 223, and the authorities there cited:—"This, then, is the great and general principle upon which the law of collateral inheritances depends; that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have originally descended; according to the rule laid down in the Year Books (*a*), Fitzherbert (*b*), Brook (*c*) and Hale (*d*), 'that he who would have been heir to the father of the deceased' (and of course to the mother or any other real or supposed purchasing ancestor), 'shall also be heir to the son;' a maxim that will hold universally, except in the

(a) M. 12 Edw. 4, 14.

(b) Abr. tit. *Descent*, 2.

(c) Abr. tit. *Descent*, 38.

(d) H. C. L. 243.

case of a brother or sister of the half blood, which exception (as we shall see hereafter) depends upon very special grounds." Now if this proposition, as applied to descents at common law, is universally true, the principle involved is applicable *mutatis mutandis* to descents in the nature of borough English. *Clements v. Scudamore* (a) is an authority in point. There, when it was ascertained that the youngest son took as heir, the right of the daughter by representation was held to attach by analogy. There is no doubt that if Edward Muggleton had died without issue, the plaintiff would have taken as heir to his grandfather, and also as heir to his uncle Edward Muggleton, because the custom is found to this extent, that the youngest son of the youngest brother inherits. Does it then make any difference that he left issue? If he had left only a son, who died seised, upon his death the plaintiff would have been entitled as heir. If, then, because the heirship is carried two steps further in the descending line, upon resorting to the same common ancestor a different rule is to prevail, this anomaly will follow, that upon matter subsequent, and so resorting back, the elder house and not the younger prevails; and while the estate having either actually or by fiction of law been assumed to pass through the grandfather, in the one case the customary heir would take, and in the other the common law heir, which is an absurdity, and in contradiction of the principle applicable to the law of inheritances generally, and also by parity of reasoning to the principle applicable to inheritances in borough English.—On this point he referred to *Doe d. Parker v. Thomas* (b).

Thirdly.—There was evidence of the existence of a custom whereby the youngest nearest male kinsman, *ad infinitum*, was entitled to inherit.—On this point the argument was in

(a) 1 P. Wms. 63.

(b) 3 Man. & G. 815.

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substance the same as that in the Court below. In addition to the authorities there cited, reference was made to Reeve's Hist. Eng. Law, vol. 3, pp. 158, 312; Lambard's Archaionomia, fol. 167, s. 36; *Godfrey v. Bullock* (a).

Hayes, Serjt., for the defendant.—First, the 2nd section of the Inheritance Act, was never intended to alter the law in cases which were plain before it passed, but only to lay down rules for tracing the descent in cases where any doubt existed: *Cooper v. France* (b). The rule “that in every case the descent shall be traced from the purchaser,” is merely affirmative of the common law. No collateral heir could ever inherit unless he claimed through the common ancestor. In Co. Litt. 12 a it is said:—“And note it is an old and true maxim in law, that none shall inherit any lands as heir, but only the blood of the first purchaser, for *refert a quo fiat perquisitum*.” With respect to the case of *Doe. d. Blackburn v. Blackburn* (c), it is enough to say that the same consequence would have followed under the old law of inheritance. It results from the rule thus stated by Littleton, Sect. 4,—“And in case where the son purchaseth land in fee simple, and dies without issue, they of his blood on the father’s side shall inherit as heirs to him before any of the blood on the mother’s side: but if he hath no heir on the part of his father, then the land shall descend to the heirs on the part of the mother.” . . . “And, if he hath no heir on the part of the mother, then the lord of whom the land is holden, shall have the land by escheate.” The Inheritance Act simply adopts the great and general principle upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the

(a) 1 Rol. Abr. 623, pl. 3.

(b) 19 L. J. Chan. 313.

(c) 1 Moo. & Rob. 547.

blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have originally descended:" 2 Black. Com. 223. The plaintiff's construction of the Act would alter the tenure of the copyhold. But there is nothing in the Act to affect a custom that the youngest son or youngest brother of the person last seised shall inherit. If, in tracing the descent, a father is to be substituted for the person last seised, the brother of the latter would be passed over.

He then argued that the second point was involved in the first and third, and that there was no evidence of a custom that so remote a collateral relation as the plaintiff should inherit.—The argument on the last point was in substance the same as in the Court below. The following additional authorities were cited: Littleton, sect. 211; Scriven on Copyholds, 29, 4th ed.; Watkins on Copyholds, vol. 2, p. 60.

Mundell replied.

Cur. adv. vult.

The learned Judges having differed in opinion, now delivered their judgments seriatim.

CROMPTON, J.—I entirely concur in the judgment of my brother *Wightman*, which I have just read (a). The authorities seem to me to establish the rule, that proof of a custom of descent, contrary to the course of the common law, prevailing in a nearer degree of consanguinity is no proof of such custom extending to a more remote degree. I am unwilling to disturb a rule of law which, as I understand the authorities, must, I think, be taken to have regulated the descent of copyhold property for more than half a century.

(a) *Wightman*, J., being unavoidably absent, his judgment was read by *Crompton*, J.

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I cannot think that the Inheritance Act, which gives a new mode of tracing a descent, is at all applicable to the question as to the extent of the custom of a manor. Assuming that the custom extended, before that Act, only to parties within a certain degree of consanguinity with the deceased ancestor, it seems to me that the question still is whether the parties are within the given degree of consanguinity. If the custom is found applicable by reason of the parties being within that degree, the customary mode of descent is to be applied, and the descent traced according to the directions of the Inheritance Act, tracing each step according to the custom. If the parties are not within the degree within which the custom is applicable, the directions of the Inheritance Act are to be followed in tracing the descent, and that descent is to be traced according to the rule of the common law. The Inheritance Act points out a new mode of tracing the descent, but does not seem to me to have the effect of extending the operation of a custom of descent in a manor, or of making any alteration as to the cases in which such custom is to be applicable. I think, therefore, that the judgment of the Court below was correct and ought to be affirmed.

WILLIAMS, J.—In this case the Judge before whom, without a jury, the trial took place, came to the conclusion in point of fact, that there was a manorial custom of descent, in the nature of borough English, extending to all collateral heirs, and the only question is, whether there was any evidence of this. I am of opinion that there was some evidence. Whether my learned brother came to a right conclusion, on consideration of that evidence, it is not necessary to give an opinion. But I do not mean, by saying this, to intimate any doubt of it.

Unless there be some recognised rule of law, or some binding authority to the contrary, I can find no reason why

the instance on the court rolls of the prevailance of this custom of descents as far as cousins german should not furnish some evidence from which it may be inferred that the custom extended to all collaterals; which, as it seems to me, might well be deemed a more reasonable, and therefore more probable, *lex loci* than that it should be extended to cousins german and no further.

It must be observed that in this case no customary was in evidence, nor any other direct proof of the custom given. Its existence and extent are only to be inferred from the entries on the court rolls. Consequently the rule of law, that customs are to be construed strictly, appears inapplicable; for the contention on the part of the plaintiff is not that the custom, which the learned Judge has found to exist, should be at all extended in its application, but that there was some evidence for his consideration of its existence to the requisite extent.

It was contended, however, on the part of the defendants, that a custom of this nature cannot be properly said to exist beyond the instances in which it can be shewn to have actually prevailed and been put in use. And certainly Lord *Coke* is reported to have so laid down the rule in *Ratcliffe and Chaplin's Case* (a), and this dictum was cited and relied on in the judgment of the Court of King's Bench in *Denn v. Spray* (b); but the more modern authorities are, I think, quite irreconcilable with it. Thus, it was held in the subsequent case of *Roe v. Parker* (c), that an ancient presentment by a homage of the customs of a manor was sufficient evidence as to a descent, though no instance was adduced of any person having taken under it. And Lord *Kenyon* said, that if the decision of *Denn v. Spray* went as far as to determine that such a document is not admissible

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(a) 4 Leon. 242.

(b) 1 T. R. 466, 474.

(c) 5 T. R. 26.

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in evidence, unless instances in fact be previously proved to warrant the introduction of it, he must beg leave to dissent from it. And *Grose, J.*, observed, as to the dictum of Lord *Coke* in *Leonard*, that it must be remembered there are considerable inaccuracies in the report of that case, and he thought Lord *Coke* meant to comment on the credit which was due to the evidence rather than its admissibility. This was followed by *Doe v. Sisson (a)*. There the custom proved by particular instances was that the eldest sister, and if she were dead, the son of such eldest sister, succeeded. But there was no instance of any descent beyond that; and the question in the cause was between the grandson of an eldest sister and the sons of two younger sisters. But one witness stated the reputation to be, that the eldest sister should take, and, if all were dead, the descendants of the eldest sister. The Court of Queen's Bench held in that case, that upon this evidence it was properly left to the jury to determine whether the grandson of the eldest sister was entitled to the whole, although there was no proof of such extended custom having been put in use.

The present case in itself affords an example of the difficulty of applying the doctrine that the custom shall only prevail as to descents of which instances can be proved. For if the contest had been whether the custom extended to uncles, it must have been held that, by reason of the want of an instance, there was no evidence of the custom extending so far as them, notwithstanding the instance of its descending further in the case of their sons. To carry this illustration a step further, suppose that in the present case there had been on the rolls a further instance of this kind of descent in the case of the children of a first cousin, would it not be more reasonable to infer that the custom extended to collaterals generally, than to suppose

(a) 12 East, 62.

that any *lex loci* could have been instituted so whimsical as to extend to first cousins once removed, and yet exclude uncles and first and second cousins?

It may be further observed that the case of *Denn v. Spray* was decided not only on the ground that the custom was not shewn to extend to collaterals, but also on the peculiar wording of the custom as contained in the customary of the manor, viz.,—“*Si aliquis tenens hujus manerii obierit,*” &c., which necessarily excluded nephews and nieces, inasmuch as they must make out their claim or pedigree through their father or mother, who never was a tenant of the manor, and, consequently, could not have died seised, and on whom therefore the custom as to the course of descent never attached. For this reason, as well as those given by my brother *Bramwell* in his judgment in the Court of Exchequer, we may well hold that *Denn v. Spray* was rightly decided, without overruling the decision of the learned Judge at the trial of the present case.

For these reasons I am of opinion that the judgment of the Court of Exchequer should be reversed.

ERLE, J.—In this case the question, in substance, is, whether there was evidence from which a jury could infer that, by the custom of the manor, the youngest in each degree of collateral male heirs should take before the elder. The Judge, acting for a jury, did make that inference.

The plaintiff was the youngest son of the youngest brother of the great grandfather of the person last seized, related therefore to him in the sixth degree, according to the civil law.

Among lineals the proof was clear, that the youngest male took before the elder universally; among collaterals, as far as the entries extended, the same custom prevailed, that is, it was clearly proved in the degree of brother, and

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beyond that degree there was no entry of an elder taking before a younger in the same degree; and there was an entry shewing the custom to extend to the fourth degree, as the youngest son of an uncle took before the elder. This appears to me to be some evidence from which a jury might infer that the custom existed.

For the plaintiff it was contended, that a custom may be presumed to have originated in a purpose, and that a purpose comprising collaterals to the fourth degree would probably comprise those in the fifth and more remote degrees. That although the presumption is in favour of the common law, and the party relying on a custom has to bear the burthen of proof, still the effect of facts from which an inference of a custom is to be made is the same in reasoning as the effect of other facts offered as a ground from which another inference is to be made, and evidence shewing that a custom to prefer the younger prevailed universally, both among lineals and among collaterals, as far as the entries extended, would raise the question why the preference given to the youngest in so many degrees should be withheld from the small number of degrees that remain, and whether the absence of a specific entry was not the result of the accident, that so remote an heir had not before taken.

The defendants relied on a rule, supposed to be laid down in *Denn v. Spray* (a), that a custom can be proved only by instances of usage entered on the Court Rolls. For this rule the Court relied on the language of Lord Coke in *Radcliffe and Chaplin's Case* (b), that the party maintaining the custom must shew precedents on the Court Rolls to prove the usage, and that it had been put in ure; and that although it had been deemed and reputed to be the true custom, yet the Court could not give credit to the

(a) 1 T. R. 466.

(b) 4 Leon. 242.

proof by witnesses. But this rule is not supported by the decision cited for it. The point for decision in *Radcliffe and Chaplin's Case* was, whether a new trial should be granted on the ground of the verdict being against the evidence, and as there were conflicting entries, the remarks which the Court adopted in *Denn v. Spray* were extra-judicial, pertinent only to an observation of the jury, that they knew the custom by reputation. Moreover, it is clear that the rule so adopted in *Denn v. Spray* was overruled in *Doe v. Sisson* (a), where evidence of reputation was held sufficient to support a finding by the jury, that the custom extended to more distant degrees than could be found entered on the Court Rolls, and this decision in *Doe v. Sisson* was confirmed and acted on by Lord Cottingham in *Locke v. Colman* (b).

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Upon this review, it seems to me that there was some evidence of the custom, and if so, the finding of the Judge is conclusive, and the judgment below ought to be reversed.

CRESSWELL, J.—In this case it appeared that there was no instance of a descent to the youngest son of the youngest great uncle, nor any reputation that such was the customary course of descent. Instances of entries short of that were proved, extending as far as the youngest son of the youngest uncle; and the question to be decided is whether such instances were evidence of the existence of the more extensive custom relied upon by the plaintiff in this case. I am of opinion that they were not.

I take the meaning of the word "custom" in this case to be "practice or course of acting," and, if that be so, then a custom can only be proved by evidence of such practice or course of acting pursued for a certain length of time; and this agrees with what is said by Lord Coke,

(a) 12 East, 62.

(b) 1 Myl. & Cr. 423.

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Co. Litt. 110, *b.* "of every custom there are two essential parts, viz., "time and usage." If custom means as I have suggested, "course of acting," unless such acting be proved the custom cannot be established. And if it be admitted that there is no evidence of any instance in which an estate has descended to the youngest son of the youngest great uncle, in my opinion there is no evidence to sustain the alleged custom.

Then let us consider whether there is evidence of such descent. Are the facts proved, viz., descent to youngest son of youngest brother, to youngest son of youngest uncle, and to youngest sons respectively of two co-parceners, facts from which we are at liberty to infer that estates have in this manor descended to the youngest son of the youngest great uncle? The fact is not proved by any direct evidence; is it to be inferred or presumed from any one or more other facts which were directly proved? A presumption, as has been well said by Mr. Starkie, (*Evid.* vol. 3, p. 927), "may be defined to be an inference as to the existence of one fact from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, a previous experience of the connexion between the known and inferred facts is essential, of such a nature that as soon as the evidence of the one is established, admitted, or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning on the subject." What inference is there in this case of any connexion between the facts proved and the fact to be inferred? But a distinction has been recognised between a presumption in the proper sense of the word, and presumptive or circumstantial evidence. Was there then in this case circumstantial evidence of lands having descended as contended for; or, in other words, were there such facts proved as to descent, that the

existence of the other fact in controversy may be rationally assumed? In *Doe v. Hilden* (a) Lord *Tenterden* on this subject says: "One of the general grounds of a presumption is the existence of a state of things which may most reasonably be accounted for by supposing the matter presumed." Applying this dictum to the ordinary case of a charge of burglary and theft:—evidence is given that a house was broken and certain goods stolen: the party accused is proved to have been near the place and to have been shortly afterwards in possession of the stolen property. That state of things is most reasonably accounted for by presuming that he committed the burglary and stole them. But how is the special course of descent proved between nearer collaterals most reasonably to be accounted for by presuming a similar custom between the more remote? The converse would fall within Lord *Tenterden's* rule. The descent of the youngest son of a youngest son may be most reasonably accounted for by presuming a course of descent to the youngest son. It seems to me then, that the facts directly proved in this case did not warrant the presumption, or, in other words, were not evidence of the existence of the other fact necessary to be established in order to make out the plaintiff's right to recover. This reasoning is supported by the decision of the Court of King's Bench in *Denn v. Spray* (b), which, as far as I know, has never been overruled, and which must be overruled if judgment be given for the plaintiff in error.

It has been suggested that if *Denn v. Spray* be taken as a decision that a custom can only be proved by evidence of its being acted upon, it was overruled in *Doe v. Sisson* (c). In that case an estate was claimed by the grandson of an eldest sister of the person last seised. Entries on the

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(a) 2 B. & Ald. 791.

(b) 1 T. R. 466.

(c) 12 East, 62.

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court rolls proved that copyholds descended to an eldest sister to the exclusion of younger sisters, and the son of an eldest sister inherited to the exclusion of the children of younger sisters. And evidence was given that the reputation of the custom was, that the more remote descendants of the eldest sister took. This evidence was objected to; but the Court held that it was rightly admitted. I quite agree in that opinion; but what was the reputation? That a certain custom, or as I explain it, course of acting existed in the manor. The reputation was therefore evidence, perhaps not very cogent, but still evidence of the fact of lands having descended in that manner. It was therefore evidence of an act done, and in perfect accordance with *Denn v. Spray*. Having therefore a decision pronounced nearly a century since, and never overruled, as a guide, and thinking it founded on sound reasoning as to the nature of the evidence necessary to prove a custom, I am contented to be now bound by it, and hold that the judgment of the Court below ought to be affirmed.

The statute 3 & 4 Wm. 4, c. 106, s. 2, has no effect on this question. Bryan Barnett died in 1854 without issue: the question is, who is *his* customary heir. To ascertain that, you must trace his pedigree through the purchaser. Edward Muggleton, his great grandfather, was the purchaser. Edward Muggleton had a youngest brother, Peter; and he had other brothers who had issue. The plaintiff claimed as youngest son of Peter.

Now the custom proved was, that the estate should go to the youngest son of the youngest brother of the person last seised. The plaintiff was not the youngest son of the youngest brother of the person last seised, but of the great grandfather of the person last seised; and the statute prescribing the mode of tracing descent does not alter or vary the custom. The eldest son of the eldest son of

the great grandfather may be the common law heir of the person last seised, ascertained in the manner pointed out by the legislature, but that will not make the youngest son of the youngest son of the great grandfather customary heir, unless the existence of a custom to that extent is proved. If, indeed, it could be made out that by operation of the statute 3 & 4 Wm. 4, c. 106, the youngest son of the great grandfather was the youngest son of his great grandson, the person last seised, there might be something in the argument, but that is absurd.

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WIGHTMAN, J.—This was an ejectment to recover certain copyhold tenements in the manor of Lyddington, in the county of Rutland. The plaintiff was the youngest son of the youngest brother of the great grandfather of the person last seised, and claimed as heir according to the custom of the manor.

The custom of descent in the manor was proved to be, that the land descended to the youngest son of the person last seised, if he had more than one (in infinitum), and if such youngest son died without issue, then to the next youngest son; and if none, then to daughters as parceners; and if no issue, then to the youngest brother; and if the youngest brother were dead, then to the youngest son of such youngest brother; and if no issue of such youngest brother, then to the next youngest brother; and if no brother, then to his sisters as parceners.

In addition to proof of the custom of descent as above, there was evidence to shew that it had been extended to the youngest son of the uncle of the person last seised, which would include the uncle himself; and to the youngest son of a sister of the person last seised.

There was no evidence whatever, not even reputation, to shew that the custom extended further, unless, as was

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contended for the plaintiff, proof that it extended to the collateral relatives before mentioned, would be evidence to shew that it extended to all collaterals however remote, and, at all events, to the plaintiff's degree of consanguinity, and that the jury might infer from the extent to which it was proved the custom had gone, that it extended further. I can find no authority whatever to warrant such a proposition; but, on the contrary, there are express decisions against it.

The custom of descent in this manor differs from the course of descent by the common law, and must therefore be construed strictly and not extended beyond the usage; and accordingly it was held in *Ratcliffe and Chaplin's Case* (reported in 4 Leon. 242, and in Godbolt, 166), that a custom that eldest sisters should take, did not extend to eldest aunts or nieces; nor a custom that the youngest son should take, to the youngest brother.

In the case of *Doe v. Mason (a)*, the question was whether the custom of a manor that copyholds descended to the youngest son, and if no son to the youngest brother, extended to the youngest nephew; and upon proof of one instance in 1657, of the youngest nephew being admitted as heir, the Court refused to disturb the verdict which was in favour of the extended custom, the evidence being conflicting. In that case, however, there was some direct evidence of the extended custom by the admission of the youngest nephew in 1657.

But the case of *Denn v. Spray (b)* is a direct authority against the plaintiff in the present case. It was there held by the Court of King's Bench, in a considered judgment, that proof that, by the custom of a manor, the copyhold lands descended to the eldest daughter, and if no daughter then to the eldest sister, was not evidence

(a) 3 Wils. 63.

(b) 1 T. R. 466.

to extend the custom to the eldest niece or other collateral. It was said in the judgment, that custom being of the very essence of copyhold, if the custom be silent the common law must regulate the course of descent.

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In *Doe v. Sisson* (a) it was held that reputation was evidence to go to the jury of an extended custom of descent to collaterals, though no evidence was given of actual instances in which such extended custom had been acted upon; and in the present case, if there had been evidence of reputation that the custom of descent in the manor of Lyddington extended to collateral relations in every degree or to the collateral relations of a great grandfather of the person last seised, the verdict for the plaintiff might have been supported; but I do not think that evidence of the admission of collaterals in certain degrees of consanguinity is sufficient to warrant the finding of a custom of descent to collaterals in more remote degrees, without evidence of instances of admissions or of reputation in accordance with such extended custom.

The statute of 3 & 4 Wm. 4, c. 106, was referred to upon the argument, but it does not appear to me to have any bearing upon this case. The question here is, to what degrees of consanguinity the custom of descent in the manor extends;—there is no difficulty in *tracing* the descent, and the object of the statute was not to alter or extend the customs of manors as to descent to collateral relations, or to give a title by descent to persons standing in more remote degrees of consanguinity to the person last seised than the custom of the manor would warrant.

Upon the whole I am of opinion that the plaintiff is *not* entitled to recover.

COLERIDGE, J.—Having been allowed to read the judg-

(a) 12 East, 62.

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ments of my brother *Wightman* and my brother *Cresswell*, I might content myself with saying that I agree generally in the view which they have taken of both the questions raised in this case; but having come to this conclusion after a good deal of hesitation, I am desirous of stating the principle of my agreement, and guarding myself against being supposed to go further than I really do.

Any rule of inheritance which is different from that prescribed by the common law, and stands on special custom only, must of course be limited by that custom. It has no presumption in its favour, but at the same time its proof rests on the same general principles of evidence which apply to the proof of any other right dependent on custom. It may be made out by reputation, accompanied by instances of its being put in ure, or by either of the two apart from the other. I speak, of course, of what would be receivable evidence to a jury in support of such a claim; for although every custom presupposes a user and all reputation must be built upon it, yet it is possible that the evidence of user may be wanting by the death of witnesses, or the destruction of the manor rolls, or other circumstances, and yet the reputation built on them may survive; and so, on the other hand, it is possible that instances may be producible in which the special mode of inheritance has been allowed, and yet there may be no customary, or presentment by the tenants, or other direct evidence of reputation, before the jury. It is quite true that mere reputation will not make a course of descent, if the absence of evidence of any instances be taken to be equivalent to there never having been any; in such case, but only then, the custom, of course and self-evidently, must be taken never to have existed. It may be very probable also that a jury would not be advised to find in favour of a custom on evidence of reputation alone, unless the absence of the other branch of evidence were satisfactorily accounted for. In this sense, and to this

extent, I quite agree with what, according to the report in Leonard, Lord *Coke* is stated to have said in *Ratcliffe and Chaplin's Case*, and so I think it ought to be understood; and I do not think that in *Denn v. Spray* (a) the judgment of the Court is inconsistent with this.

Where, in support of a customary mode of inheritance, recourse is had both to reputation and instances in accordance, in the case of a custom, which, like that now before us, extends to many particulars, instances, I conceive, must be receivable in support of reputation, even though they cannot be adduced as to all the particulars; and the proof will be more or less cogent according as the particulars adduced do in reason conduce more or less to the belief of the whole custom. In such a case, it would be impossible to reject the evidence of such instance as tendered, or to strike the whole proof out of the case because it did not cover the one particular which was in question in the cause. It could not be denied that the reputation of a local law of descent was made more probable, as to the whole, by proof of its having been acted on in the greater number of the particulars comprised in it, merely because there was no proof adduced of its having been acted on in one particular. The addition of that one would have made a difference in degree, not in kind or principle.

Where, as in the present case, instances alone are relied on, the custom in all its particulars is necessarily to be ascertained from them; and so far as the existence of it in any one or more steps leads not merely to a conjecture, but to a reasonable belief, that it must exist in another, the proof of the former will be evidence of the latter, although the Court Rolls afford no instance of it. Thus, if it be shewn that the youngest nephew, born of the youngest

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brother, inherits under certain circumstances in preference to his own elder brothers and to all the nephews by any elder brother of the person last entitled, it is reasonable to infer that the custom prevails as to the youngest brother himself under the same circumstances, though it may so happen that the instance may not appear in the rolls, or be capable of proof by other evidence. For if the youngest brother could not have inherited had he been alive, it is unreasonable to suppose that his youngest son should take, he being dead. Instances, therefore, in more remote degrees may well be evidence of the custom in nearer degrees. It would be mere caprice to depart from the common law in the remoter and adhere to it in the nearer, and there is a prescription against such caprice, because it is of the essence of a good custom to be reasonable. But the converse does not hold: from an instance in the nearer degree there is no ground to infer the custom in one more remote; it is at least as reasonable to suppose that the departure from the common law by special custom has been limited to such nearer degree, and that the inheritance has thenceforward followed the general rule, as that it has gone further, and if so, it is reduced to conjecture, which is not a ground on which rights are to be determined. The same observation would apply as to lineals and collaterals. This principle has been recognised in many cases which have been cited, and to which I need only refer generally; and the present case appears to me clearly to fall within it. I see no reason, from the instances specified, to infer the existence of the custom as to the much more remote collateral degree of relationship in which the plaintiff stands to the deceased, who was last entitled.

I think, therefore, that the judgment of the Court below should be affirmed, and I the more readily come to this

conclusion because I believe it to be in agreement with the general understanding and practice of the profession, and the decision of *Denn v. Spray*.

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COCKBURN, C. J.—I concur with those of my learned brothers who are of opinion that the judgment of the Court of Exchequer in this case ought to be reversed.

It appears to me that from the facts proved in this case the inference necessarily arises that the custom of this manor, that as amongst those related in equal degree to the person last seised the youngest should inherit in place of the eldest, extends to the case of the plaintiff, unless, indeed, there is some positive and inflexible rule of law which prohibits us from giving to the evidence all the effect to which it would otherwise be entitled. I am of opinion that there is no such positive or inflexible rule, and I therefore entirely concur in the view taken by the learned Judge who, by the consent of the parties, acted at the trial of this case as Judge of fact as well as of law, that upon the facts proved, it was sufficiently established that in the absence of lineal heirs, or of collateral heirs in a nearer degree, the customary descent in this manor extended to the case of the youngest son of the youngest grand uncle, and consequently that the plaintiff, who stood in that relationship to the person who died last seised, was entitled to this estate as heir according to the custom.

From the evidence of the court rolls of this manor, it appeared not only that in the course of lineal descent the youngest son of a deceased tenant inherited in preference to an elder; but that where, in default of issue, it became necessary to resort to collateral heirs, the youngest brother succeeded in preference to the eldest brother, and, if the youngest brother were dead without issue, the next youngest

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brother; and that even if it became necessary to ascend a generation higher, the youngest son of a youngest uncle (and therefore by implication a youngest uncle) was entitled to inherit in preference to elder male relations in the same degree. From these numerous instances of preference given to the youngest of the male relations in the same degree, it appears to me, looking at it as a mere question of fact upon the evidence, that the inference legitimately arises that the customary rule of descent in the manor is that the inheritance shall always descend to the youngest male relative in the nearest degree, where, by the common law course of descent, it would go to the eldest.

It is said, however, that there is a rule of law which prevents us from drawing any inference as to the custom of descent in a manor, whereby to extend it beyond the instances of admission actually proved to have taken place. It becomes necessary, therefore, to consider whether the authorities relied upon to preclude such inference as would otherwise legitimately arise from the facts are sufficient to make good the position contended for. The cases principally relied on are *Bayly v. Stevens* (a), *Reve v. Malster* (b), *Ratcliffe v. Chaplin* (c), and *Denn v. Spray* (d). As regards the two cases in *Croke*, the custom had been specifically found to be that the youngest son of the person last seised should inherit in the place of the eldest, without any mention whatever of the case of collaterals; and all that the Court can properly be taken to have held was that a custom found with reference to lineal descendants only could not by legal intendment, without further evidence, be extended to collaterals. In the case of *Ratcliffe v. Chaplin* there were conflicting entries on the court rolls of the manor as to whether

(a) Cro. Jac. 198.

(b) Cro. Car. 410.

(c) 4 Leon. 242.

(d) 1 T. R. 466.

the eldest of several female heirs should alone inherit, or all should inherit as co-parceners; notwithstanding which, the jury found in favour of the eldest sister upon their own knowledge of the usage of the country as existing in divers places within the same hundred. The Court very properly held that this species of vague and extrinsic reputation would not do; and they said, that without evidence of precedents on the Court Rolls to prove the custom and that it had been put in ure, credit could not be given to the mere statement of witnesses as to it. The whole effect then of the decision is, (so far as it relates to the point in question before the Court), that the custom of a manor is to be proved by the Court Rolls, and not by parol testimony or hearsay. It is however further incidentally stated in the case, that it was agreed by the Court that if the custom had been that the eldest sister should inherit, yet by that custom the eldest aunt or the eldest niece should not inherit; nor the youngest uncle where the custom was that the youngest son should have the land. It may be observed that these dicta are altogether extra-judicial, the only question in the case before the Court being whether extrinsic evidence as to the custom was admissible; but taking them to be authority so far as they go, the effect of them is only, like the decisions in *Bayly v. Stevens* and *Reve v. Malster*, to establish that a custom proved as to a single generation, and in the lineal descent, ought not, without more, to be extended to collateral branches in a more remote generation. The case of *Denn v. Spray* went, however, a step further. It was there held that where it was shewn that a custom that as among females the eldest only should inherit extended not only to daughters but to sisters, it could not thence be inferred that the custom extended to the case of an eldest niece (of which there was no actual instance);

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although in a customary of the manor, which the Court recognized as legal evidence, it was expressly declared that no tenements within the manor were divisible, whether among heirs male or female. The Court admits the authority of *Ratcliffe v. Chaplin* to the fullest extent, treats the customary of the manor as entitled to no weight, adopts the language of Lord *Coke* in its most general sense, without referring it to the subject-matter to which it was in fact addressed, and lays it down that a custom cannot be extended further than there are actual instances in the Court Rolls to establish it. The judgment in this case appears to me, I am bound to say, unsatisfactory and inconclusive, and to have proceeded on a misapprehension of the scope and effect of the judgment in *Ratcliffe v. Chaplin*. Its authority appears to have been very much shaken by the subsequent case of *Doe v. Sisson* in 12 East, p. 62. There, in addition to the evidence of entries in the Court Rolls of the admission, in default of heirs male, both of the eldest of several daughters and of the eldest of several sisters, evidence of reputation was also given that in the absence of all the foregoing the descendants of such an eldest daughter or sister were entitled to inherit. And the Court held that such evidence of reputation was rightly received to establish the claim of a great nephew, (an eldest sister's grandson), although no instance of such an admission appeared upon the Court Rolls. Upon a review of these authorities, it appears to me that there is no positive rule of law which prevents us from giving to the evidence the effect to which it is otherwise entitled. I readily concede that there is sufficient authority for saying that customs are to be construed strictly. But I think that this rule must itself receive a reasonable interpretation. It may be observed, that at the time this doctrine was laid down, customs were looked upon with disfavour, as being

encroachments on the common law. Later historical researches have shewn, however, that instead of this being the case, these local customs are remnants of the older English tenures, which, though generally superseded by the feudal tenures introduced after the dominion of the Normans had become firmly established, yet remained in many places, probably in manors which instead of passing into the possession of Norman lords, remained in the hands of the English proprietors. These customs, therefore, are not merely the results of accident or caprice, but were originally founded on some general principle or rule of descent. I am, however, quite ready to admit that we ought not to extend a custom beyond what is shewn to have actually taken place, except where very clear and cogent evidence enables us to see that the custom is based on a more extended principle. Thus, if there are only instances of the custom in the lineal course of descent, I agree that it should not thence be inferred that the custom extends to collaterals; or, vice versâ, where the custom is only proved in the case of collaterals. But where, as in this case, the proof of a customary course of descent, not only among lineal descendants but also among collaterals for two generations, leads legitimately to the conclusion that such mode of descent is based on a principle of universal application within the manor—as here, that the youngest shall in all cases inherit instead of the eldest, the evidence ought, as it seems to me, to be carried to its legitimate consequences.

It is said, indeed, that custom, being no more than user, must necessarily be limited to the extent to which the use has been carried. I think this is too narrow a view of the subject. I agree that where the usage is confined to a single and specific instance, it would be improper to assume that it has a larger application; but where we find a variety

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of instances, all referable to a common principle, I think it would be illogical and unreasonable that the custom should be stated, not as involving that general principle, but as confined to the particular instances shewn to have occurred. Thus, where, as in the present case, it is found that, not only among lineal descendants, but also among collaterals to the second and third generation, the youngest male is preferred to the eldest, I think the inference ought necessarily to be drawn that the customary rule of descent was that the youngest male in whatsoever degree should inherit in preference to the eldest. Nor am I at all embarrassed by the circumstance that in the records of this manor no instance of the youngest son of a youngest grand uncle (which is the present case) has ever been admitted. A long series of generations might pass away before such a case would arise. In the great majority of instances estates are transmitted in the lineal course of descent. When that line sometimes fails, they go to brothers or to brothers' children; more rarely to an uncle or an uncle's children; and in but a few rare instances to a grand uncle or the children of a grand uncle. One can easily understand, therefore, that in the generations which have passed since the records of this manor have been preserved, no instance of such a succession may have arisen; but we must not forget that these ancient tenures, in all human probability, existed long before the period since which these manorial records have been preserved. They must have had some principle or rule as their origin and foundation; and when, as in this case, the instances which are proved enable us to discover a plain and intelligible rule, I think we should not hesitate to apply it, although the particular instance with which we are dealing may not be shewn to have occurred. A very striking illustration is afforded by the case now before us of the inconvenience which would follow from the adop-

tion of a different rule. The case states an instance of the admission of the youngest son of the youngest uncle of the person last seised; but there is no instance of the admission of a youngest uncle. Now, if the rule contended for on the authority of *Ratcliffe v. Chaplin* and *Denn v. Spray* were to prevail, this extraordinary anomaly would arise, that while the son of the youngest uncle could inherit, the uncle himself, though nearer in degree, could not: a consequence so obviously absurd as forcibly to illustrate the unsoundness of the doctrine from which it would spring. Again, in this very case there is no instance of the admission of a youngest grandson; yet surely no one, in the face of the several instances in which it is here admitted that the custom has extended to collaterals, could bring himself to doubt that upon this evidence the custom must be held to extend to a youngest son of a youngest son deceased, as it would have descended to the youngest son if living.

On a careful consideration of this case and on the grounds I have stated, I am of opinion that the judgment of the Court of Exchequer should be reversed, and judgment given for the plaintiff.

Judgment affirmed.

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IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

Nov. 27.

PRESTON v. TAMPLIN and HOLMES.

H., being the owner of a steam vessel, sold 32-64th shares in her to M'C. & Co., and agreed that they should have "the full and exclusive direction, management and control of the said vessel, to be dealt with and managed by them, as managing owners and ship's husbands, as they might think best, without any let or hindrance of the said H.; and, as such managing owners and ship's husbands,

should have 5 per cent. on the gross earnings, to be made or produced in any employment or service in which the vessel might be engaged by them; and further, that M'C. & Co. shall from henceforth be and become the managing and the exclusive owners, for the purpose of employing the said vessel in any service they may think fit. It being part of this agreement that M'C. & Co. were to pay to H. 900*l.* as a charter for his 32-64th shares for the first six months, for which sum M'C. & Co. were to have the entire use and control of the steamer and all her earnings for that period." Repairs having become necessary during the continuance of this charter.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that under the agreement M'C. & Co. had power, as ship's husbands, to bind H. by contracts for such repairs; and that such repairs having been done, H. was liable for the price to the persons employed by M'C. & Co. as agents for the parties liable.

(a) Before Coleridge, J., Erle, Crompton, J., Crowder, J., and J., Cresswell, J., Williams, J., Willes, J.

the joint property of the defendant Holmes and themselves, with the exception of six months, during which they were to have the entire control of the ship. During the six months Holmes had no interest in the ship or its working. One joint owner who gives up to another joint owner all interest in the vessel, and all control over her, is not liable upon the contract of such joint owner. M'Clune and Tamplin were not managing for the defendant Holmes; Holmes had leased the vessel to them. For six months, and during that period, M'Clune and Tamplin were the entire owners of the ship. A master appointed by them could not have been Holmes's master, so as to make Holmes responsible for his misconduct. [*Willes, J.*—The agreement provides that M'Clune and Tamplin “shall *henceforth* be and become the managing and exclusive owners.” J. Holmes was never at any time to have any voice in the management of the ship.]

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Mihoard, for the respondent, was not called upon.

COLERIDGE, J.—We are all of opinion that the judgment of the Court of Exchequer must be affirmed. If the case rested upon the first clause, it would be clear: “In consideration of the purchase by T. M'Clune and F. A. Tamplin, J. N. Holmes hath agreed with them that they should have the full and exclusive direction, management and control of the steam vessel ‘Rose,’ to be dealt with and managed by them as managing owners and ship's husbands, as they might think best, without any let or hindrance of the said J. N. Holmes, &c.; and further, that T. M'Clune and F. A. Tamplin shall *henceforth* be and become the managing and exclusive owners for the purpose of employing the said vessel in any service they may think fit, and as

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such be entitled to deduct, and take by way of commission, the commission or remuneration of 5*l*. per cent." &c. M'Clune and Tamplin would have had the power as managing owners to bind the defendant for these repairs, and whether the persons dealing with them knew anything of the defendant would be immaterial. But it is said that the last clause suspends the operation of the former clause. We think it has not that effect; that it is merely subordinate, and amounts only to a liquidation of the proportion of profit to be paid to Holmes for the use of the vessel during the six months; and that it does not alter the situation of the parties with reference to each other, created by the former stipulations.

Judgment affirmed.

MEMORANDA.

In the present Vacation, The Honourable Sir *Cresswell Cresswell*, Knight, resigned the office of Judge of the Court of Common Pleas, and was thereupon appointed Judge of the Court of Probate, and Judge Ordinary of the Court for Divorce and Matrimonial Causes.

John Barnard Byles, one of her Majesty's Serjeants-at-law, was appointed a Judge of the Court of Common Pleas in the room of Sir *Cresswell Cresswell*.

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POOLE v. THE NATIONAL PROVINCIAL LIFE ASSURANCE
SOCIETY.

1858.

Jan. 15.

DECLARATION for work and labour of the plaintiff as the agent of the defendants.

Plea (inter alia).—That the claim of the plaintiff accrued, and is founded upon, and is due and payable under and by virtue of a certain contract made between the plaintiff and the defendants: That at the time of the making of the said contract the defendants were a Joint Stock Company, having obtained a certificate of complete registration and completely registered under the provisions of the Act passed, &c. (7 & 8 Vict. c. 110): And the plaintiff at the time of making the said contract was a director of the said Company duly appointed under the provisions of the said Act, and of the deed of settlement of the said Company. That the said contract was not within the exceptions contained in the 29th section of the said Act, and that the plaintiff being such director and being interested in the

The 29th section of the 7 & 8 Vict. c. 110, which provides that no contract entered into by a Joint Stock Company, in which a director is interested, shall have force until approved and confirmed by the shareholders, (except "a contract for the purchase of an article or of service, which is respectively the subject of the proper business of the Company,") does not authorize a

director without the sanction of the shareholders, to sell any article or service to the Company, but only to deal with them in the way of their business.

Therefore, where an insurance Company employed one of its directors, for certain commission, to establish agencies in the country:—*Held*, that the contract was void, it not having been approved and confirmed by the shareholders.

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said contract voted and acted as a director on the subject of the said contract and in the making thereof, contrary to the said statute: That the said contract has never been submitted to any general or special meeting of the shareholders of the said Company, nor has any such general or special meeting been summoned or held for the purpose of approving or confirming the said contract, nor has the same ever been so confirmed and approved.—Issue thereon.

At the trial before *Bramwell*, B., at the London sittings after last Michaelmas Term, it appeared that the defendants were a Joint Stock Company for the assurance of lives, and in July 1851 were completely registered under the 7 & 8 Vict. c. 110. From the time of its establishment the defendant had been a director of the Company. At a meeting of the board of directors on the 13th August, 1851, at which the plaintiff was chairman, a resolution was passed, that it was “deemed expedient by the directors that a person should be appointed to select agents and medical referees in the North of England, or in such counties as the party so appointed should select, who should be compensated only on the amount of business transacted with and by the agents and medical referees so appointed; and that the usual travelling expenses of 1*l.* 1*s.* per day should be allowed, together with a commission of 3*l.* per cent. on the premiums of all policies effected through such agencies until the premiums should amount to 1000*l.* per annum, when it should be reduced to 1½ per cent. on all subsequent premiums.” At the same meeting it was further resolved that the plaintiff be appointed to this office. The plaintiff accepted the appointment, and established agencies at Manchester, Norwich, Birmingham, and other towns. The appointment was never approved or confirmed at a meeting of shareholders. The plaintiff now sought to recover the commission of 3*l.* per cent. on all the premiums received by

the defendants from the 25th December 1855 to the 26th February 1857, in respect of policies effected by means of the agencies established by the plaintiff.

It was objected on behalf of the defendants that the contract was void by the 29th section (a) of the 7 & 8 Vict. c. 110. It was submitted on behalf of the plaintiff that this was a contract within the exception of that section. The learned Judge was of opinion that the statute only authorized contracts where the director was a buyer, not a seller, of the goods or service; and his lordship directed a verdict for the defendants, reserving leave to the plaintiff to move to enter a verdict for him.

Parry, Serjt., now moved accordingly.—This is a contract “for the purchase of service” within the exception of the 29th section (a) of the 7 & 8 Vict. c. 110. A contract of this kind with a director is valid, provided it is made upon the same terms as any like contract with other customers or purchasers of the Company. [*Pollock*, C. B.—

(a) Enacts:—“That if any director of a Joint Stock Company registered under this Act be either directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the Company, whether for land, materials, work to be done, or for any purpose whatsoever, during the time he shall be a director, he shall, on the subject of any such contract in which he may be so concerned or interested, be precluded from voting or otherwise acting as a director; and that if any contract or dealing (except a policy of assurance, grant of annuity, or contract for the purchase of an

article or of service, which is respectively the subject of the proper business of the Company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers), shall be entered into, in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meetings,” &c.

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The meaning of the exception is plain. If the Company is established for the supply of water, coals, gas, or any other article, a director may buy of the Company, water, coals, gas, or other article just as the public at large may deal with them, provided the director is supplied on the same terms: so with respect to service, if the Company is a Steam Tug-Company, a director may purchase their steam power, but if the contract is not in respect of an article or service in which the Company deals, it must be sanctioned by the general body of shareholders.] This is a contract for the purchase of service which is the subject of the proper business of the Company. [*Pollock*, C. B.—The proper business of the Company is to insure, not to establish agencies: that is only a mode of carrying on their business. It may as well be said that it is the business of the Company to purchase pens and ink, or chairs and tables. *Channell*, B.—Could the Company employ a director as a clerk without the sanction of the shareholders?] They might, provided they employed him on the same terms as other clerks. [*Pollock*, C. B.—The statute only contemplates two ways in which the Company can be occupied; the one in furnishing goods, the other in furnishing service.] A director is not prohibited from entering into a contract of this kind, but only from voting in respect of it.

POLLOCK, C. B.—I am of opinion that there ought to be no rule. The meaning of the section is perfectly clear. In the first place, a director is not to vote, or act at all, in respect of a contract in which he is interested—that is all that is intended by the first part of the section. Then, by the subsequent part, if the other directors choose to contract or deal with any director, the opinion of the body of shareholders must be taken upon it, unless it is a matter in which

the director is dealing with the Company as a customer ; and then if he has purchased any article or the performance of any service, upon the same terms as other customers, such article or service being the subject of the proper business of the Company, the contract is valid.

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MARTIN, B.—I am of the same opinion. The defendants are an insurance Company, and the plaintiff claims for services done by him for the Company. He is a director, and consequently must be in the condition of a person entitled to recover by the 29th section of the 7 & 8 Vict. c. 110. The first part of that section prohibits a director from interfering at all with the making of a contract in which he is interested. The section goes on to provide, that a director, though interested, may enter into certain contracts, if they are approved and confirmed by the majority of shareholders. It also permits him to enter into any "contract for the purchase of an article or service, which is respectively the subject of the proper business of the Company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers." It is not the subject of the proper business of this Company to employ persons to go into the country and get agents to procure customers for the Company—if it were, the plea would afford no answer to the action. But the subject of the proper business of the Company is the business in which the Company is ordinarily engaged or professes to be engaged, such as the service rendered by a Steam-Tug Company, or the sale of an article in which the Company deals. I have no doubt whatever as to the meaning of the enactment.

CHANNELL, B.—I am of the same opinion. The plaintiff is a director of the Company, and it is conceded that the

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contract in question was not approved and confirmed by a majority of the shareholders; therefore it is void by the 29th section of the 7 & 8 Vict. c. 110, unless provided for by the exception in that clause. There are no other words in the exception which provide for this contract, except the words "contract for the purchase of service." The question then is, whether they mean a contract for service rendered *to* the Company or *by* the Company. I am of opinion that they mean a contract for service *by* the Company, and not *to* the Company. The words are "any contract for the purchase of an article,"—if it had stopped there, it would mean any contract for the purchase of an article by a director from the Company, the Company being the sellers. It goes on "or service," that is, service sold by the Company. This opinion is strengthened by two circumstances: in the first place, the contract is to be the subject of the proper business of the Company, as the supply of gas by a Gas Company, or of steam power by a Steam-Tug Company; and further, the contract is to be made on the same terms as any like contract with any other customers of the Company. In this case the Company is the purchaser of the service; and, for the reasons I have stated, I am clearly of opinion that the statute means service to be rendered by the Company, and not by a director as agent for the Company.

Rule refused (*a*).

(*a*) *Parry*, Serjt., then mentioned that there was another action between the same parties, in which the plaintiff sought to recover for services by him as

"assessor of fire losses;" but the Court were clearly of opinion that the contract was open to the same objection.

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*Indy. reversed in Ex. Ch.
44 H & N 327.*

**M'MANUS v. THE LANCASHIRE AND YORKSHIRE
RAILWAY COMPANY.**

Jan. 26.

THE declaration (a) alleged a breach of promise by the defendants, in not providing trucks reasonably fit and proper for the carriage of the plaintiff's horses, from Liverpool to York, on the defendants' railway: whereby the horses were injured.

Pleas (inter alia)—Secondly: that the trucks were reasonably fit and proper for the carriage of the horses.—Thirdly: that the promise was made upon and subject to the terms that the plaintiff should undertake all risks whatever of the carriage and conveyance by the defendants of the horses, and that the defendants would not be responsible for any injury or damage, howsoever caused, occurring to the horses whilst being carried and conveyed upon the railway. And that the injury occurred to the horses whilst being carried and conveyed upon the railway.

Replications joining and taking issue on the pleas.

The cause came on for trial before *Watson, B.*, at the last Liverpool Assizes, when the following facts were agreed upon by the counsel on both sides:—The plain-

loading and unloading, whatsoever; as the Company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." The truck proved (as the fact was) to be insufficient for the carriage of the horses; and a hole was made in the bottom of it on the journey, by which the horses were injured. Twopence a mile for hire was charged, being the regular charge for conveyance in open trucks, under tickets in the above form, from the cattle station. Fourpence per mile was the charge for horses forwarded from the passenger station in "horse-boxes," under similar tickets.

Held: First, that the condition was reasonable: secondly, that it protected the defendants from liability in respect of the defect in the truck.

The plaintiff brought three horses to the cattle station of the defendants' railway at Liverpool to be forwarded by a cattle truck to York. The defendants' servant provided a truck for the purpose, which, to all external appearance, and so far as the servant knew, was sufficient for the purpose. The plaintiff signed a ticket which contained the following memorandum:—
"This ticket is issued subject to the owner's undertaking all risks of conveyance,

(a) It was admitted by the plaintiff's counsel that the declaration, as framed, could not be supported.

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tiff, on the 16th of December 1856, brought three horses to the cattle station of the defendants' railway at Liverpool, to be forwarded by a cattle truck to York. The defendants' servant at the station provided a truck for the purpose of the horses being loaded therein. The truck, to external appearance and so far as the servant knew, was sufficient for the purpose. The plaintiff paid at the rate of 2*d.* a mile for the forwarding of the horses to York by the truck, and then signed a ticket, a copy of which is below :—

Lancashire and Yorkshire Railway
 District.

171.
 No. 92.

LIVE STOCK DEPARTMENT.

No. of Waggon.	Quantity.	Description.	Rate.	Amount.	Paid on.	Paid Dr.	Dr.	No. Docks Station, 16th Dec. 1856.
2931	3	Horses	2 <i>d.</i>	£2:10:0		£2:10:0		Name H. McManus.
		Per mile						Address York.
	1	Man			Free			From No. Dks. to York.
								J. C. J. Clerk.

N.B. This Ticket is issued subject to the owner's undertaking all risk of conveyance, loading and unloading, whatsoever, as the Company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description, travelling upon the Lancashire and Yorkshire Railway, or in their vehicles.

H. Mc \times Manus. { Owner, or on the owner's behalf,
 agrees to the above terms.

The truck proved, as the fact was, to be insufficient for the safe carriage of the horses, and a hole was made in the bottom of the truck in the journey by which the horses were injured to the extent of 25*l.* The charge for three horses laden at the cattle station is 2*d.* a mile per horse. Horses so laden are always forwarded in open trucks of

the construction of that used in the present case, under tickets in this form; and trucks are forwarded from the cattle station by a cattle or luggage train.

At the passengers' station horses are taken at the rate of 4d. a horse per mile. Horses laden at this station are forwarded in horse-boxes by the trains departing from the passenger station, usually passenger trains (a).

Any amendment in the pleadings, proper to raise the real question, to be made.

The Court to have power to draw any inferences of fact.

Under the direction of the learned Judge, a verdict was entered for the plaintiff, leave being reserved to the defendants to move to enter the verdict for them.

Hugh Hill, in last Michaelmas Term, obtained a rule nisi accordingly on the ground that, upon the facts admitted at the trial, the defendants were not responsible for the injury and damage of which the plaintiff complained.

Blackburn and *Brett* shewed cause (Jan. 15).—The facts raise two points: first, whether the liability of the defendants is limited by the notice at the foot of the ticket: and, if so, secondly, whether the condition is so unreasonable as to be void under the 17 & 18 Vict. c. 31, s. 7. First, the defendants being common carriers were bound to provide vehicles reasonably fit and secure for the carriage of the horses which they undertook to convey. The case is analogous to that of a shipowner, who, notwithstanding the exception in a charter-party as to perils of the seas, is bound to provide a seaworthy vessel. [*Pollock*, C. B.—It is a new thing to carry animals by land.] A carrier is bound to carry according to his public profession. He may, if he thinks fit,

(a) The case then set out the form of the ticket issued by the Company under such circumstances, and which contained the same condition as the ticket above mentioned.

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carry goods only, or he may carry any particular species of goods only; but if he holds himself out to the public as also a carrier of animals, he cannot restrict his liability by saying that he will not be responsible for their conveyance. [Martin, B.—Is the owner of a general ship bound to carry cattle?] There is no authority on the subject; but if he undertakes to carry them, an exception in the bill of lading as to risks of the voyage, will not release him from his obligation to provide a seaworthy vessel. So, here, though the defendants say that they will not be responsible for risks of conveyance, they are nevertheless bound to provide secure vehicles. In Story on Bailments, sect. 562, it is said that it is “a part of the implied contract of every carrier to employ a vehicle suitable for the transportation; and if by water, to employ a vessel reasonably stout, strong, and well equipped for the voyage.” [Martin, B., referred to *Sharp v. Grey* (a).] The providing an insufficient vehicle is not a risk of conveyance, but a breach of contract preliminary to the conveyance. The Company, indeed, say that they will not be responsible for any injury or damage, “howsoever caused;” but if the latter words be construed in their largest sense, they would include the case of larceny. According to the contention on the part of the defendants, they would not be liable even if they furnished a truck knowing that it was unsafe. In *Shaw v. The York and North Midland Railway Company* (b), the declaration alleged that the defendants received the plaintiff’s horse to be “safely and securely carried by them,” and the Court held that that allegation was disproved by the terms of the ticket: the decision, therefore, proceeded on the ground of variance. But Lord Denman, C. J., in delivering judgment of the Court, said,—“It may be that, notwithstanding the terms of the contract, the plaintiff might have alleged that

(a) 9 Bing. 457.

(b) 13 Q. B. 347.

it was the duty of the defendants to have furnished proper and sufficient carriages, and that the loss happened from a breach of that duty." *Carr v. The Lancashire and Yorkshire Railway* (a) only decided, that under a contract of this kind, the owner takes upon himself all *risk of conveyance*, and that the railway Company are merely bound to find carriages and propelling power. In *Chippendale v. The Lancashire and Yorkshire Railway Company* (b), the judgment of *Erle, J.*, proceeded on the express ground that the vehicle was safe and proper for the journey. In *Austin v. The Manchester, Sheffield and Lincolnshire Railway Company* (c), the terms of the notice were sufficiently large to include a loss arising from gross negligence.

Secondly, the condition is unreasonable and void by the 17 & 18 Vict. c. 31, s. 7. In construing the statute, regard should be had to the common law, the mischief and the remedy provided: *Heydon's Case* (d). Before that statute, railway Companies refused to carry goods or animals, except upon terms which relieved them from all liability, and if they gave notice of those terms no one had power to vary them: *Walker v. The York and North Midland Railway Company* (e). The legislature interposed, and said that conditions limiting the liability of railway Companies shall be void, unless in the opinion of the Court they shall be just and reasonable. This condition is not reasonable. Railway Companies have de facto a monopoly; and the words "howsoever caused" would exempt them from all liability whatever. [*Martin, B.*, referred to *Pardington v. The South Wales Railway Company* (f), and *Wise v. The Great Western Railway Company* (g).] In those cases the terms of the

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(a) 7 Exch. 707.

(b) 21 L. J., Q. B. 22.

(c) 10 C. B. 454.

(d) 3 Rep. 7. b.

(e) 2 E. & B. 750.

(f) 1 H. & N. 392.

(g) 1 H. & N. 63.

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conditions were not so extensive as in the present case.—
 They also referred to *White v. The Great Western Railway Company (a)*.

Hugh Hill and *J. Addison*, in support of the rule.—
 The first question depends on what was the contract entered into by the parties. It was subject to the owners undertaking all risk of conveyance; and the injury in respect of which the plaintiff seeks to recover was a risk of conveyance. In *Lyon v. Mells (b)*, Lord *Ellenborough*, C. J., said, that the not providing a sufficient vessel was “a personal negligence of the owner, or, more properly, a non-performance on his part of what he had undertaken to do.” In *Chippendale v. The Lancashire and Yorkshire Railway Company*, the jury found that the truck was so defectively constructed as to be unfit and unsafe for the purpose of conveying cattle along the line, and yet it was held that the Company were protected by the terms of the ticket. *Coleridge*, J., there points out the distinction between that case and *Lyon v. Mells (b)*. Here there was no negligence on the part of the defendants, and the common law liability of carriers does not extend to the carriage of live animals. The truck, to external appearance, was sufficient for the safe carriage of the horses, but it proved insufficient. That is a risk of conveyance within the terms of the condition. There are manifold risks arising from the conveyance itself, such as a defect in an axletree, or the wheels being heated, or injury from the steam-engine or an adjoining carriage, or the state of the railway or bridges, or the negligence or misconduct of the servants of the Company, and in all these cases the Company would be protected. In *Austin v. The Man-*

(a) 2 C. B., N. S. 7.

(b) 5 East, 428.

chester, Sheffield and Lincolnshire Railway Company (a), the condition was in nearly the same terms as the present. In *Carr v. The Lancashire and Yorkshire Railway Company (b)*, the defendants were guilty of gross negligence, and yet it was held that they were protected by their notice. There *Parke, B.*, abstained from expressing any opinion as to whether the Company were liable as common carriers in respect of the carriage of cattle, but observed that it was very reasonable that railway Companies should be allowed to make agreements for the purpose of protecting themselves against a new risk. *Chippendale v. The Lancashire and Yorkshire Railway Company* is an authority that this injury falls within the risks of conveyance. The words, "howsoever caused," should be read in connection with the words "risk of conveyance."

Secondly, the condition is reasonable. In *Simons v. The Great Western Railway Company (c)*, the condition was more extensive than the present, and the Court held it reasonable. *Pardington v. The South Wales Railway Company (d)* is also an authority that there is nothing unreasonable in such a condition. [*Martin, B.*—One way of testing it is to expand the terms of the condition: suppose the Company had written on the ticket that they would not be responsible for any injury to the horses by reason of a defect in the truck, would that have been reasonable?] There would be nothing unreasonable in such a contract. [*Channell, B.*—Suppose they had said that they would not be responsible whether the truck was sound or unsound; and whether a defect was known or not. *Martin, B.*—It is difficult to say that they would not be responsible if they allowed the cattle to get into a truck which they knew was out of repair. Suppose they knew of a defect in the fastening of the door, and by the shaking of the railway the door opened

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(a) 10 C. B. 454.

(b) 7 Exch. 707.

(c) 18 C. B. 805.

(d) 1 H. & N. 392.

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and the cattle fell out, they would surely be responsible.] If they knew of the defect there would be a personal default on their part. This condition only protects the Company against latent defects. If they provide a truck which so far as they know is safe, there is no reason why they should not limit their responsibility. All that they do is to repudiate the notion of their being insurers, and it is not unreasonable for them to say that they will not insure the sufficiency of the carriages or the railway.

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B.—This was an action to recover damages for injuries to three horses belonging to the plaintiff, which were delivered to the defendants to be conveyed from Liverpool to York by their railway. The parties agreed upon a written statement of facts, upon which the Court is to give their judgment. It is in substance as follows:—That the horses were delivered to be forwarded by a cattle truck from Liverpool to York, for reward: that the defendants' servants provided a truck for the purpose, which, to all external appearance and so far as they knew, was sufficient for the purpose: that the plaintiff signed a ticket which contained a memorandum:—"This ticket is issued, subject to the owner's undertaking all risks of conveyance, loading and unloading, whatsoever; as the Company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles.

"H. Mc x Manus." { Owner, or on the owner's behalf,
 agrees to the above terms."

That the truck provided proved (as the fact was) to be insufficient for the safe carriage of the horses, and a hole

was made in the bottom of it in the journey, by which the horses were injured: that 2*d.* a mile for hire was charged, being the regular charge for conveyance in open trucks, under tickets in the above form, from the cattle station: that 4*d.* per mile is the charge for horses forwarded from the passenger station in horse boxes, under similar tickets.

Two points were made on behalf of the plaintiff. First, that the terms of the notice did not extend to protect against a defect in the truck itself; and, secondly, that if they did, the notice was not reasonable and ought to be entirely disregarded, under the authority given by the statute 17 & 18 Vict. c. 31, s. 7, (The Railway and Canal Traffic Act.)

To this it was answered by the defendants, first, that the notice was reasonable, for which two authorities were cited, viz., *Simons v. The Great Western Railway Company* (a) and *Pardington v. The South Wales Railway Company* (b); and that, if so, it protected the defendants; for which *Chippendale v. The Lancashire and Yorkshire Railway Company* (c) was cited; and that, even supposing it was rejected as unreasonable, the defendants were not responsible, there being no negligence shewn, and the rule as to the liability of carriers for all losses not caused by the act of God or the Queen's enemies, did not extend to horses or live animals.

We are of opinion that the cases cited in the argument decided, and must govern, the present case. In *Simons v. The Great Western Railway Company*, the Court of Common Pleas held that the 15th clause of the notice of The Great Western Railway, viz., "That goods conveyed at special or mileage rate must be loaded and unloaded by the owners or their agents; and the Company will not be responsible for any risk of stowage, loss, or damage, how-

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(a) 18 C. B. 805.

(b) 1 H. & N. 392.

(c) 21 L. J. Q. B. 22.

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ever caused; nor for discrepancy in the delivery as to either quantity, number, or weight; nor for the condition of articles so carried; nor for detention or delay in the conveying or delivery of them, *however caused*,"—was reasonable within the statute. In *Pardington v. The South Wales Railway Company*, this Court held that a memorandum relating to live animals, that the Company are to be held "free from all risk and responsibility in respect of any loss or damage arising on the loading or unloading, from suffocation, or from being trampled on, bruised, or otherwise injured in transit, from fire, or from any other cause whatever," was reasonable. It seems to us that these notices are quite as extensive as the one now in question, and that our judgment must be that the notice is reasonable.

Then the decision in the case of *Chippendale v. The Lancashire and Yorkshire Railway Company* furnishes a direct authority that it extends to defects in the trucks. In that case the notice was the same as the present; the jury had found that the truck was unfit and unsafe for the conveyance of cattle, and that the damage was consequent upon it. My brother *Coleridge* and my brother *Erle* held that the notice protected the Company. This case is expressly in point, and we concur in it. We think one of the risks of conveyance of live cattle is the risk of their breaking the trucks or boxes in which they are conveyed.

We are able to decide this case without referring to the second point made by the defendants, viz., the alleged distinction between the liability of carriers as to the conveyance of horses and live stock and ordinary goods; but, should the question ever arise, we think the observation which fell from Baron *Parke* in *Carr v. The Lancashire and Yorkshire Railway Company* is entitled to much consideration.

Our judgment will therefore be for the defendants.

Judgment for the defendants.

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CASANDRA WILBY v. THE WEST CORNWALL RAILWAY
COMPANY.

Jan. 20.

THIS cause came on for trial before *Crowder, J.*, at the Gloucestershire Spring Assizes, 1857, when a verdict was taken for the plaintiff, subject to the following case:—

The declaration stated that the plaintiff, on the 29th September, 1856, delivered to the defendants, as and being common carriers of goods for hire, and they, as and being such carriers, received from the plaintiff two cases of goods of the plaintiff's, to be safely and securely carried and conveyed by the defendants for the plaintiff, to wit, from Penzance in Cornwall to Wolverhampton in Staffordshire, and there safely and securely to be delivered by the defendants to the plaintiff, for reward to the defendants in that behalf: Yet the defendants, whilst they had the said cases of goods for the purpose aforesaid, did not take due and proper care of the same, but neglected to do so; and so carelessly, negligently, and improperly carried and delivered the same, and took so little and such bad care thereof, that by the carelessness, negligence, and improper conduct of the defendants in that behalf, divers of the goods became and were broken, damaged, and destroyed.

There was a second count similar to the first, except that it related to three cases of goods delivered to the defendants on the 4th of October, 1856.

by railway to Wolverhampton. The Company carried the parcel by their railway to Hayle, where they delivered it to a steam-boat, by which it was conveyed to Bristol and from thence by railway to Wolverhampton. The goods in the parcel having been damaged *after* the delivery to the steam-boat.—*Held*, that, under these circumstances, a jury might infer a contract by the Company, as common carriers, to carry the whole distance from Penzance to Wolverhampton; and, consequently, that they were liable for the damage to the goods.

Also, that it is not *ultra vires* for the Company to carry beyond their own line by sea or by coach.

A parcel was delivered at Penzance, to The West Cornwall Railway Company, addressed to a person at Wolverhampton, "per first steamer from Hayle." The Company's railway only extends from Penzance to Truro; but their practice is to send goods for Bristol, or places above it, to a sea port called Hayle, and there deliver them to the steam-boats; and to send parcels for Bristol, or places above it to Truro and there deliver them to other carriers, who carry them from Truro to Plymouth (for which distance there is no railway), and from Plymouth they are sent

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The pleas were, first :—That the plaintiff did not deliver, nor did the defendants receive, the cases of goods in the manner and for the purposes in the declaration alleged. Secondly: Not guilty.—The plaintiff joined issue on these pleas.

The defendants are the owners of The West Cornwall Railway, and are carriers of goods on that line of railway. It is a line running from Truro to Penzance. It is an isolated line, there being no other railway within many miles of any part of it. The length of the line is twenty-five miles.

There is on The West Cornwall Railway a station at Hayle, which is a sea port, distant about eight miles from Penzance, and steam vessels run and carry goods between Hayle and Bristol; and from Bristol to Wolverhampton goods are carried by railway.

The practice on the defendants' line has been, and is, to send goods received at Penzance for Bristol or places above it (and which are not specially directed to go by another route) to Hayle, and there to deliver them to the steamers; and to send parcels received at Penzance for Bristol and places above it (and which are not specially directed to go by another route) along their whole line to Truro, and there to deliver them to other carriers, who carry them sixty-six miles (for which distance there is no railway) to Plymouth; from whence they are sent by railway to Wolverhampton. "Parcels" are all goods or packages weighing from 1 to 12 or 15 cwt. each, if from their nature they require more than ordinary care in their conveyance. This practice has been adopted with a view to insure greater safety in the transit of goods more than ordinarily liable to injury.

The defendants have no connection or arrangement with the proprietors of the steam-boats from Hayle to Bristol,

or with the railways from Bristol to Wolverhampton, or any other carriers.

The defendants send a cart round at Penzance to collect goods. On the 29th of September, 1856, the plaintiff had two cases of goods which were in the possession of one William Hodgson, at Penzance, who was to send them off to her at Wolverhampton. At Hodgson's request, the defendants' cart called and the cases were delivered into it; and Hodgson handed to Henry Rowe, the carter or servant of the defendants, for signature, and he signed, a paper writing in the following words:—"Penzance, Sept. 29/56. Delivered to the W. C. Railway in good condition 2 cases for Mrs. Wilby, Stafford Place, Wolverhampton. Delivered by W. H. Hodgson, for Mrs. Wilby. Sept. 29, 1856. Henry Rowe."

The cases were addressed, "Mrs. Wilby, Stafford Place, Wolverhampton: Glass, with care, per first steamer from Hayle."

(The case then proceeded to state the delivery to the defendants, on the 4th of October, 1856, of three other cases of goods addressed in the same manner, and for which a receipt was given in the same form.)

All the above cases weighed from 2 to 3 cwt. each, and, but for the directions written upon the cases, they would have been treated as "parcels" by the defendants, and been sent along their line to Truro, and from thence to Wolverhampton, as above mentioned.

The defendants carried the said cases by their railway to Hayle, where they delivered them into a steam-boat by which they were conveyed to Bristol. They were not damaged at the time of such delivery.

The said cases were delivered by The Great Western Railway Company to the plaintiff at Wolverhampton, when part of the contents thereof were found to be broken and

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damaged: they had been properly and carefully packed. It is not known at what point on the journey the goods were damaged, except that it was not until after the defendants had delivered them into the steam-boat; but the damage, wherever it happened, was the result of carelessness and improper conduct.

The Court is to be at liberty to draw any inference of fact which a jury might properly draw.

The question for the opinion of the Court is, whether the verdict is to be entered for the plaintiff or the defendants, on the issues joined: if for the plaintiff, it is to be for 25*l*.

Gray, for the plaintiff.—This case is governed by the decision in *Muschamp v. The Lancaster and Preston Railway Company* (a). There a parcel was delivered at Lancaster to that Company, directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the book-keeper said it had better be paid by the person to whom it was directed, on the receipt of it. The Company were known to be proprietors of the line only as far as Preston, where their railway unites with the North Union Line, and that afterwards with another, and so on into Derbyshire. The parcel having been lost *after* it was forwarded from Preston; this Court held that the Lancaster and Preston Railway Company were liable for its loss. There, *Rolfe*, B., told the jury “that if a party brings a parcel to a railway station, which in this respect is just the same as a coach-office, knowing at the time that the Company only carried to a particular place; if the railway Company receive and book it to another place to which it is directed, *prima facie* they undertake to carry it to that other place.” The Court held that direction to be correct; and that it was a question for the jury to say,

(a) 8 M. & W. 421.

upon the evidence before them, what was the nature of the contract. So, here the Court, being at liberty to draw inferences of fact, will infer that the defendants contracted to carry the goods the whole distance from Penzance to Wolverhampton. The defendants will, perhaps, attempt to distinguish this case by two circumstances: first, that these goods are what the Company call "parcels," and if no special direction had been upon them, they would have been forwarded by Truro and Plymouth. But the case does not find that the plaintiff had any notice or knowledge of the practice of the Company in that respect. Another circumstance is the address on the cases, "per first steamer from Hayle." But that is nothing more than pointing out a convenient route; and as the Company did not object to carry the goods by that route, they are responsible for their loss.

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Phipson, for the defendants.—The authority of the decisions on this subject is not disputed; but they do not govern this case, which is novel in its circumstances. The defendants' railway only extends from Penzance to Truro, a distance of twenty-five miles: from Truro to Plymouth the carriage is by coach, a distance of sixty-six miles. By the other route, the defendants carry goods on their line to Hayle, and there deliver them to the steamers. From the mere fact of the delivery to this Company of a parcel directed to Wolverhampton, or York, or London, it cannot, as a matter of law, be implied that they contracted to carry to those places. If so, they would be contracting in a way not authorized by their act of parliament, for they would become carriers by sea and by coach. The case contains no statement that the Company professed to be responsible as common carriers beyond their own line. If, indeed, it appeared that the Company had at any time paid damages for a loss which occurred in the transit by steam-boat or

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coach, a jury would be warranted in finding a contract to carry in that manner; though the objection would still be open whether such a contract was not ultra vires. In *Muschamp v. The Lancaster and Preston Railway Company*(a), it was arranged that the carriage money should be paid at the end of the journey; and that fact is adverted to by the Court as evidence from which the jury might properly infer a contract to carry the whole distance. In *Scothorn v. The South Staffordshire Railway Company*(b), *Collins v. The Bristol and Exeter Railway Company*(c), and *Crouch v. The London and North Western Railway Company*(d), there were continuous lines of railway from the terminus to the place of delivery, and the defendants had power to carry over the lines of the other Companies. Again, in *Scothorn v. The South Staffordshire Railway Company*, one sum was paid for the carriage the whole distance. Here, there is no evidence of any payment for the carriage. In *Crouch v. The London and North Western Railway Company* the defendants had held themselves out as carriers between two places, one of which was beyond the confines of England, and therefore they became subject to the common law liabilities of carriers to that place. But the mere circumstance of the receipt by the Company of a parcel directed to a place beyond their line does not necessarily, in law or in fact, amount to an undertaking to carry by steam-boat or coach. If so, the effect would be to subject them to a liability different from their ordinary risk. Moreover, in this case, there was a special direction on the parcels.—He also referred to *Bostock v. The North Staffordshire Railway Company*(e).

Gray was not called upon to reply.

(a) 8 M. & W. 421.
 (b) 8 Exch. 341.
 (c) 11 Exch. 790.

(d) 14 C. B. 255.
 (e) 4 E. & B. 798; 3 Sm.
 & G. 283.

POLLOCK, C. B.—The Court being at liberty to draw the same inferences as a jury, we entertain no doubt as to what conclusion we ought to draw; though I should have been better satisfied if it had fallen to the province of a jury. However, we must decide a question of fact, viz., whether there was evidence for a jury that the defendants undertook to carry the parcel the whole distance from Penzance to Wolverhampton; or whether they only undertook to carry it from Penzance to Hayle, and there place it on board a steam-packet, when their responsibility would end. It has been argued that the cases cited do not decide this point; but in my judgment it makes no difference that part of the carriage is by land and part by water. The question is the same, whether there is a continuous railway for the whole distance, or whether there is a short railway, then a carriage by van, then a carriage by water, and then again by railway. Suppose a parcel is brought to a railway station in London, directed to a person in Birmingham, and it is accepted for the purpose of delivery, it is a question for the jury whether that was not done with the intention of carrying it the whole distance. In this case, if I had been on the jury, I should have had no hesitation in finding that the defendants undertook to carry the parcel from Penzance to Wolverhampton.

WATSON, B.—I am of the same opinion. This is rather a question of fact than of law, and as to the fact I entertain no doubt. It appears that the defendants carry to Wolverhampton by two routes: they carry goods from Penzance to Hayle and there deliver them on board steam-packets for conveyance to Bristol, from whence they are taken by railway to Wolverhampton: they also carry parcels along their line to Truro and there deliver them to other carriers who take them to Plymouth, from whence they are

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forwarded by railway to Wolverhampton. The defendants are also in the habit of giving a very equivocal form of receipt for the goods delivered to them, and which is signed by their agent (his lordship read the receipt). Then was that a contract by the defendants to carry, as common carriers, from Penzance to Hayle and there deliver the parcel on board the steam-packet, or was it a contract to carry as common carriers from Penzance to Truro on their own line and then forward the parcel to Wolverhampton? There is nothing to shew that the responsibility of the defendants, as common carriers, ceased when the parcel arrived at Hayle. In *Muschamp v. The Lancaster and Preston Railway Company* (a) the question was properly left to the jury. Indeed, it would be most inconvenient, if, when a parcel is sent from London to Glasgow (when it is carried on four different railways), the owner was obliged to find out at what particular part of the journey it was lost. It is said that the Company did not profess to carry the whole distance; but if a person delivers to a railway Company a parcel directed to a certain place, one sum being charged for the whole carriage, and the Company accept it, that is a holding out by them to the person who brought the parcel that they would carry it as directed; and it is no answer to say that they have never carried to that place before. Then it is said that there is no evidence of the payment of the carriage; but we must infer that when the parcel arrived at Wolverhampton the plaintiff would pay the whole amount. The case is the same as *Muschamp v. The Lancaster and Preston Railway Company*, and it makes no difference whether the carriage is paid at the beginning or at the end of the journey. It is conceded that *Muschamp v. The Lancaster and Preston Railway Company* was well decided, but it is said that this case is distinguishable, because for a

(a) 8 M. & W. 421.

certain distance the sea intervenes; but all railway Companies strive to extend their traffic, and it would be strange if a Company who undertook to carry goods from London to Paris, were not liable for a loss at Boulogne, because their line did not extend beyond Dover or Folkestone. The same may be said of the carriage of goods from London to Dublin, or from London to Barton and from thence across the river Humber to Hull. There is nothing unreasonable, so as to lead to the conclusion that the Company did not contract to carry by sea. I think that in this case the contract was to carry the entire distance, there being nothing in the conduct of the parties to shew that the Company were mere agents, beyond their line, to forward the parcels.

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CHANNELL, B.—The point comes before the Court on a special case, and we are relieved from all difficulty as to drawing inferences. The question then is, whether the Court can infer an undertaking on the part of the defendants, as common carriers, to carry from Penzance to Wolverhampton. That the defendants were common carriers on their own line of railway is not disputed, nor could it be; but it is said that beyond the extent of their own line they are not subject to the liabilities of common carriers, because they only undertook to forward, not to carry, the goods. I am of opinion, that the goods were received by the defendants to be carried by them, as common carriers, from Penzance to Wolverhampton. It would be inconvenient if we were to hold that, upon the construction of these facts, the plaintiff was in the situation of a person who did not contract with the defendants beyond the extent of their own line, or who made separate contracts with a number of different carriers between Penzance and Wolverhampton. I should have been more satisfied if the question had been submitted to a jury, but,

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since we have to decide it, I think that the defendants undertook to carry the whole distance. With respect to the argument that there was a special direction that the parcels should be sent by steamer from Hayle, that circumstance does not, in my opinion, alter the case. The question still is, whether the defendants' liability was that of common carriers. If they did not like to carry by steamer as directed, they were at liberty to reject the parcel, but they did not do so. As to the objection that the carriage by sea was *ultra vires*, I do not at present see any distinction between carrying by sea and carrying on the line of another person.

Judgment for the plaintiff.

In the Matter of a Plaint and Appeal from the County Court of Sussex in a Plaint wherein VALLANCE and Others were Plaintiffs; J. L. NASH Defendant, and EDMUND EDMONDS, interpleader Claimant.

Jan. 19.

Under 19 & 20 Vict. c. 106, s. 68, an appeal from the decision of a County Court in proceedings in interpleader, lies where the value of the goods claimed against the execution creditor exceeds 20*l.*, though the execution is for a sum less than 20*l.*; and the claimant, to prevent the goods from being sold, has paid such sum.

C. POLLOCK, on behalf of the claimant, had obtained a rule calling upon the plaintiffs and the judge of the County Court of Sussex, to shew cause why the judge should not sign a case for the opinion of this Court.

It appeared from the affidavits that the plaintiffs having obtained a judgment against the defendant for 10*l.* 0*s.* 11*d.* debt and costs, the bailiff of the County Court seized certain goods in the dwelling-house of the defendant, which he alleged would not fetch 15*l.*, and left a man in possession. One Edmonds claimed the goods; upon which an interpleader summons was issued, and the parties were heard by the judge of the County Court, when the claim was dismissed. The goods were never sold or removed,

but the officer remained in possession until after the decision of the judge, when the claimant paid the debt and costs. The claimant's attorney then presented to the County Court judge a case on appeal, and produced an affidavit, with an inventory and valuation, shewing that the goods seized were of the value of 34*l.* 8*s.*, but the judge decided that the amount recovered by the plaintiffs being under 20*l.* no right of appeal existed, and refused to sign the case.

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Phipson now shewed cause on behalf of the judge of the County Court.—By the 19 & 20 Vict. c. 108, s. 68, an appeal from the decision of a County Court was for the first time given in proceedings “in interpleader, where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, exceeds 20*l.*” That which is claimed is not the value of the goods but the amount in dispute, in other words, what is claimed *as against the execution creditor*. In order to ascertain what that is, it is necessary to look at the warrant. [*Pollock*, C. B.—The claimant alleges that the execution creditor has seized goods belonging to him exceeding 20*l.* in value. *Martin*, B.—If the construction contended for is right, the owner of goods of the value of 1*l.*, where the judgment is for more than 20*l.*, might appeal; and yet, if a picture of the value of 100*l.* were seized to satisfy a debt of 5*l.* there would be no appeal.] The policy of the Act is to give an appeal where the contest is respecting a matter above the value of 20*l.* [*Pollock*, C. B.—The case is within the words of the Act, and there is not the slightest reason why we should not give full effect to the terms used. *Channell*, B.—The legislature has introduced the words “the value of the goods or chattels claimed or of the proceeds thereof;” the construction contended for would give no meaning to these words.]

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Spinks, on behalf of the execution creditor.—It was not satisfactorily shewn that the goods were of the value of 20*l.*; the evidence should be clear to bring a case within the section giving the appeal. [*Pollock*, C. B.—We cannot hear you on the merits. The judge of the County Court made no objection as to the amount.]

C. Pollock, in support of the rule, was not called on.

Per CURIAM (*a*).—The rule must be absolute.

Rule absolute.

(*a*) *Pollock*, C. B., *Martin*, B., *Watson*, B., and *Channell*, B.

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A sheriff is not entitled to poundage upon a writ of *elegit*, unless he has extended the land under the writ. Therefore, where a judgment creditor issued three writs of *elegit* on successive judgments, and the sheriff delivered to him possession of the land under the first writ:—*Held*, that the sheriff had no power to extend the land under the second and third writs, and consequently was not entitled to poundage on those writs.

THIS was an action to recover the sum of 115*l.* 5*s.* 6*d.*, alleged to be due from the defendant to the plaintiffs, as sheriff of Middlesex, for poundage on two writs of execution. The defendant pleaded "never indebted," upon which issue was joined. The cause came on for trial before *Erle*, J., at the Surrey Summer Assizes, 1856, when a verdict was entered for the plaintiff, subject to the opinion of the Court on a case which was (in substance) as follows:—

The plaintiffs, before and at the time of the delivery to them of the several writs of *elegit* hereinafter mentioned, and thence continually until after the returning and filing by them of the several inquisitions hereinafter mentioned, were sheriff of the county of Middlesex. On the 10th of August, 1852, the now defendant recovered judgment against one Benjamin Lumley, in the Court of Queen's Bench, for the sum of 2000*l.* and 3*l.* 10*s.* interest, &c., upon which judgment, the same being unsatisfied, he sued out a writ of *elegit*, directed to the sheriff of Middlesex,

indorsed with a direction to levy 1,143*l.* 10*s.* and interest 1*l.* 1*s.*, &c. This writ was on the 3rd November, 1852, delivered in the ordinary course to the plaintiffs, as the then sheriff of Middlesex, to be executed.

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On the 7th October, 1852, the now defendant recovered another judgment against the said B. Lumley, in the Court of Queen's Bench, for the sum of 12,000*l.* and 3*l.* 10*s.* interest, and upon which judgment, the same being unsatisfied, he sued out a second writ of elegit, directed to the sheriff of Middlesex, indorsed with a direction to levy 6003*l.* 10*s.* and 1*l.* 5*s.* interest, &c.; this second writ was on the 6th January, 1853, delivered to the plaintiffs, as such sheriff, to be executed.

On the 14th November, 1852, the now defendant recovered a third judgment against the said B. Lumley, in the Court of Exchequer, for the sum of 2809*l.* 1*s.* 2*d.*, and interest, &c., upon which last mentioned judgment, the same being unsatisfied, he sued out a third writ of elegit, indorsed with a direction to levy 1411*l.* 14*s.* 8*d.* and interest on 1409*l.* 1*s.* 2*d.* and 2*l.* 2*s.*, &c. This third writ was, on the 22nd January, 1853, delivered to the plaintiffs, as such sheriff as aforesaid, to be executed.

After the delivery of the first writ of elegit, and before the delivery of the second and third writs, other writs of elegit, founded on judgments against the said Benjamin Lumley, were delivered to the plaintiffs, as such sheriff, at the suit of other parties.

The said Benjamin Lumley, at the time of the signing and entering up of these judgments respectively, and from thence continually until and on the 26th January, 1853, was possessed as of his own lands and tenements, of a term of years yet to come and unexpired, of and in certain lands in the county of Middlesex, being the lands included in the lease hereinafter mentioned, and which said term was

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and is yearly of the value of 3000*l*. The question nevertheless is left open, whether this lease was at any time forfeited. The facts upon this part of the case are set forth in the special case of *Croft v. Lumley*, as reported in 5 Ell. & Bl. 648, which special case as there reported shall be taken as part of this case, and reference may be made thereto.

In pursuance of instructions given by the now defendant and of similar instructions from the other judgment creditors, the plaintiffs, on the 26th January, 1853, held inquisitions under all the writs before mentioned; and after hearing evidence, verdicts were found on the said several inquisitions, which were respectively embodied in inquisitions which were duly returned and filed in the proper office, with two exceptions.

The inquisition taken under the first writ, at the suit of the now defendant, was filed on the 24th February, 1853, and the inquisitions taken under the second and third writs, at the suit of the now defendant, were filed on the 7th October, 1853.

The lease set out in the several inquisitions was the lease referred to in the case of *Croft v. Lumley*, hereinbefore mentioned.

The draft of the first inquisition was submitted by the plaintiffs to the solicitor of the now defendant for his approval, and was approved by him in the form in which it was ultimately drawn up. The drafts of the second and third inquisitions were also submitted to the solicitor of the now defendant for his approval, and were altered by him, by striking out of the drafts, as originally prepared by the now plaintiffs, a statement that "the plaintiffs were unable to deliver the said lands and tenements and hereditaments to the now defendant, because they had already delivered them to him under the said first writ of elegit," and by

inserting a statement that the plaintiffs had caused the same to be delivered to the now defendant by a reasonable price and extent, and subject to the estate, term and interest therein of the now defendant, under and by virtue of the first writ of elegit aforesaid, and also subject to the estate, term and interest of the other elegit creditors hereinbefore mentioned.

The poundage on the first writ was duly paid by the now defendant, but he refused to pay the plaintiffs any poundage in respect of the execution of the second and third writs, and no poundage has yet been received by the plaintiffs in respect of the execution of the said two last mentioned writs, or either of them.

In order to obtain actual possession of the premises extended, an action of ejectment was brought in the month of June, 1853, against the said Benjamin Lumley and one William Fish, and on the trial of that action the plaintiff gave in evidence the said three inquisitions taken on the said three writs of elegit, at the suit of the now defendant, and also the said other inquisitions hereinbefore mentioned. A special case was stated for the opinion of the Court, (the arguments and judgment on which are reported in 4 E. & B. 274,) and finally, and before the commencement of this suit, judgment was obtained in such action in favour of the right of the now defendant to recover, but the now defendant abstained from taking steps to obtain possession.

Afterwards and before the commencement of this suit, that is to say, on the 27th April, 1855, the now defendant by deed assigned to Lord Ward, in consideration of a certain sum of money, the three judgments so recovered by him as aforesaid, and all his estate and interest under them respectively, and all principal moneys, interest and costs thereby recoverable.

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The said Benjamin Lumley remained in possession of the Opera-house, by permission of Lord Ward, and has since become tenant thereof to him.

The Court is to be at liberty to draw any inference from the facts hereinbefore stated which a jury might draw.

The question for the opinion of the Court is, whether the plaintiffs are entitled to poundage in respect of the execution of the second and third writs of elegit, or either of them; and if so, to what amount. And if the Court shall be of opinion that the plaintiffs are entitled to poundage in respect of the execution of the second and third writs of elegit, or either of them, then the verdict is to stand for the plaintiffs for such sum as the Court shall direct; but if the Court shall be of opinion that the plaintiffs are not entitled to any poundage on either of the said writs, then a verdict is to be entered for the defendant.

Honyman, for the plaintiff.—The sheriff is entitled to poundage in respect of the execution of the second and third writs of elegit. [*Watson*, B.—The question is, whether possession was ever delivered under those writs. No poundage is due on an elegit, except there be a delivery of possession. Suppose A. sues out a writ of elegit, under which possession is delivered to him, and then the sheriff receives another writ at the suit of B., he could not deliver possession to B. In *Peacock v. Harris* (a), *Powell*, J., said, “that it was the opinion of *Holt*, C. J., that the sheriff should have fees for executing an elegit; but he said he doubted of that, because it would be unreasonable when the whole debt is 500*l.*, and perhaps the land extended but 20*l.* per annum, that the sheriff should have fees for 500*l.*” *Martin*, B.—Under what statute does the sheriff claim the

(a) 1 Salk. 331.

poundage?] He is entitled to it under the 29 Eliz. c. 4, s. 1: the 3 Geo. 1, c. 15, s. 16, only regulated the amount. *Nash v. Allen* (a) is an authority that the 16th section of the latter Act must be read as if the word "elegit" was in the enacting part. [Watson, B.—Can there be a tenant in possession and also a tenant in remainder by elegit, and poundage payable on the full value of the land, under each writ?] The sheriff has taken inquisitions under the three writs, and has extended the land under the first. As to the second and third, he proposed to return that he was unable to deliver the land to the defendant, because he had already delivered it to him under the first writ. At the defendant's request, that was altered by stating that the sheriff had caused the land to be delivered to the defendant, subject to his interest under the first writ: therefore the defendant is estopped from saying that the sheriff has not given him possession. [Martin, B.—Do you contend that the sheriff is entitled to poundage on the whole value of the land, under each writ?] *Tyson v. Paske* (b) decided that a sheriff might maintain debt for his fees for executing an elegit, for the execution is complete, although the tenant by elegit is put to an ejectment. That case is an authority that the 29 Eliz. c. 4, s. 1, gave the sheriff a right to poundage on the execution of a writ of elegit. The words "for the executing of any extent upon the lands of any person," include an elegit. In *Peacock v. Harris* (c) the question was not whether the sheriff was entitled to poundage, but only as to the amount. The combined effect of the 3 Geo. 1, c. 15, and 29 Eliz. c. 4, is, that the sheriff is not entitled to poundage on the amount indorsed on the writ, but only according to the yearly value of the land extended. [Channell, B.—The right to poundage depends upon whether

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(a) 4 Q. B. 784.

(b) 1 Salk. 333.

(c) 1 Salk. 331.

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possession has been delivered. The question therefore is, whether what has been done amounts to a delivery of possession under the second and third writs, the first writ remaining in force. Could the land be delivered under the three writs at once?] Upon the execution of the first writ, there was a reversion in the debtor, which was extendible under the other writs. [*Martin, B.*—The interest of the debtor does not seem to be a reversion: it is like that of a person who has granted a right to enter his land and levy the profits.] Tenants by elegit have but a chattel interest: Co. Litt. 42 a.

H. Lloyd, for the defendant.—Assuming that something remains to the debtor after the execution of an elegit, it is not an interest which can be extended under a second writ, for if it were, it would have been taken under the first. The proper return in this case is, that the sheriff has already extended the lands. Under the 7 Wm. 4 & 1 Vict. c. 55, the sheriff is entitled to fees for taking the inquisition, independently of his poundage. In this case the sheriff's right to poundage depends entirely on the 3 Geo. 1, c. 15, s. 16, and the 29 Eliz. c. 4, has no application. A term of years may either be delivered to the plaintiff, at an extended annual value, as part of the lands of the defendant, or it may be delivered to the plaintiff as part of the defendant's chattel property, the jury having first appraised it at a gross sum: *Fleetwood's Case (a)*, Arch. Prac. p. 633, 9th ed. If the sheriff delivers the term as *land*, he cannot have poundage under the 29 Eliz. c. 4; nor can he under the 3 Geo. 1, c. 15, s. 16, if he delivers the term as a chattel. Here the term was delivered as land, and unless "possession or seisin," within the meaning of the 3 Geo. 1, c. 15, s. 16, was given under the second and third writs, no

(a) 8 Rep. 171.

poundage is payable. Actual possession is not given, but a right to treat the debtor as a trespasser and bring ejectment, though the tenant by elegit may (if he can) enter without ejectment: *Rogers v. Pitcher* (a). [*Martin*, B., referred to the judgment of *Coltman*, J., in *Newton v. Harland* (b).] In 2 Wms. Saund. 68, d, note, it is said, "If the sheriff return that he has taken an inquisition of the defendant's lands, but could not deliver a moiety to the plaintiff, because it was already extended, the plaintiff may have a *capias ad satisfaciendum* or *fieri facias*; for the sheriff does not deliver the lands, which is the only bar given by the statute: 1 Roll. Abr. 905, pl. 6, *Palmer v. Knowlles* (c)." Formerly, when only a moiety of the land could be extended, if two writs of elegit issued at the suit of different creditors, and a moiety of the land was extended under the first writ, the sheriff could not deliver a moiety of the entirety under the second writ, but only the moiety of the remaining moiety: *Huit v. Cogan* (d). That shews that land already extended is not capable of being extended under other writs. If so, the sheriff might extend the land under any number of successive writs, and exhaust its value in poundage.—He was then stopped by the Court.

Honyman, in reply.—Could the defendant upon this return to the second and third writs have writs of *ca. sa.* or *fi. fa.*? A reversion expectant on the determination of a mortgage may be extended: *The Mayor, &c., of Poole v. Whitt* (e). In less than four months the first judgment would be satisfied. [*Pollock*, C. B.—In that case the debtor might have a right to have the land back again,

(a) 6 Taunt. 202, 207.

(b) 1 Man. & G. 663.

(c) 1 Leon. 176.

(d) Cro. Eliz. 483. See *Doe d. Davies v. Creed*, 5 Bing. 327.

(e) 15 M. & W. 577.


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but that is not an interest which the law recognises.] If in this case the debtor had been seised in fee, subject to a term of years, he would have had a reversion which would have been extendible.

POLLOCK, C. B.—We are all of opinion that the sheriff is not entitled to poundage upon either the second or third writ. In my judgment, there was nothing which the law recognises as an estate or interest left in the debtor, capable of being taken under those writs. Under the first writ every thing was taken that could be taken, and nothing remained. The sheriff therefore, under the two other writs, has really seized nothing and handed over nothing, and can have no right to poundage.

MARTIN, B.—I am of the same opinion. The claim is for poundage for executing certain writs of elegit, and I am of opinion that the sheriff could not, by law, execute either the second or third writ, having executed the first; and for the reason which he proposed to give on his return to the first inquisition, viz., that he was “unable to deliver the lands, tenements and hereditaments to the defendant, because he had already delivered them to him under the first writ.” That is a true return, and I think it correctly states the law on the subject. Upon looking at what a writ of elegit directs to be done, this is plain. The sheriff is commanded that he deliver the debtor’s lands to the execution creditor, “to hold the said lands to him and his assigns as his freehold, according to the form of the statute, until the debt and damages shall be thereof fully levied.” Therefore, as it seems to me, the sheriff entirely exhausted his power of acting under the other writs when he executed the first. It is said, however, that the defendant altered the return, and

that circumstance gave a right as against him. But there is no estoppel as between the defendant and the execution debtor. Then it is argued that there is a reversion expectant on the determination of the execution under the first writ, and that the execution creditor ought to have that interest, and so the sheriff is entitled to poundage. I think that is not so, because such an interest is not a *tenement* within the meaning of the Statute of Elegit (stat. Westm. 2, 13 Ed. 1, st. 1, c. 18). In this case the execution debtor had only a term in the land, and upon the transfer of that the whole is spent, and what remains in him is not a reversion but a right to the possession of the term after satisfaction of the first writ(a). I am clearly of opinion that the sheriff is not entitled to poundage under either the second or third writ, because in law he has not executed them.

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WATSON, B.—I am of the same opinion. The question turns upon the two statutes 29 Eliz. c. 4, s. 1, and 3 Geo. 1, c. 15, s. 16. It appears from the cases of *Peacock v. Harris* (b) and *Tyson v. Paske* (c) that the 29 Eliz. c. 4, gave the sheriff poundage on executing an elegit. But doubts having arisen as to the amount, the 3 Geo. 1, c. 15, s. 16, (after reciting that “for ascertaining the fees for executing writs of elegit, so far as the same relates to real estate,” &c.), restricts the poundage to a certain amount according to the yearly value of the land of which the sheriff has delivered possession or seisin. Although the word “elegit” is not found in the enacting part of the clause, the intention clearly was that it should apply to an elegit, and the language is large enough to include that writ. Then, upon what is poundage to be paid? It is to

(a) See *Lampet's Case*, 10 Rep. 46 b.

(b) 1 Salk. 331.

(c) 1 Salk. 333.

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be paid in respect of land whereof the sheriff has delivered possession or seisin. Of what has the sheriff, in this case, delivered possession or seisin? According to my experience, where two successive writs of elegit are delivered to a sheriff, the return has always been, that he is unable to deliver possession of the land under the second writ, because he has already extended it under the first. Our attention has been called to a passage in 2 Wms. Saund. 68 d, from which it appears, that, upon such a return being made, there is no execution of the writ, and the plaintiff is entitled to a ca. sa. or fi. fa. It is clear also, upon the authority of *Huit v. Cogan* (a), (where it was held that, under a second writ of elegit, a moiety only of the remaining moiety was extendible), that land cannot be extended under a second writ when possession has been delivered under the first. It is not necessary to determine whether a reversion can be extended, or whether, when the amount of poundage is less under the 29 Eliz. c. 4, than under the 3 Geo. 1, c. 15, it is payable under the one statute rather than the other. The question here is, has the sheriff executed the writ within the meaning of the statute of Elizabeth, or has he delivered possession of the land within the statute of Geo. 1? He has done neither, and therefore I am clearly of opinion that he is not entitled to poundage.

CHANNELL, B.—In the view I take of this case, it is not necessary to decide whether, when a sheriff is entitled to poundage, his right depends on the 3 Geo. 1, c. 15, alone, or whether on that Act in connection with the 29 Eliz. c. 4, because I think, in this case, that the sheriff is not entitled to any poundage in respect of the second writ, and, consequently, cannot be in respect of the third.

(a) Cro. Eliz. 483.

When those writs came to his hands, he proposed to state in his return the true fact, but that was altered by the defendants' solicitor. The alteration, however, would not give the sheriff a right to poundage. I agree with my brother *Watson* that this view is supported by the passage cited from 2 Wms. Saund. 68 d, note.

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JONES and Another v. CLARKE.

Jan. 14.

DECLARATION.—That the plaintiffs sold to the defendant, ex ship "Ion" from Savannah, deliverable in London, and subject to her arrival there, 400 or more loads of pitch pine timber, at 4*l.* 5*s.* per load, &c., timber warranted of fair average quality, to be taken on a fair average of the cargo, &c., payment by acceptance at six months date from arrival of the ship, allowing ten days for delivery: that the plaintiffs had done all things, and that everything had duly happened to entitle them to maintain this action; yet the defendant would not accept the timber or pay for the same by acceptance.

Pleas.—First, that the defendant did not sell the timber upon the terms therein mentioned.—Secondly, that the timber was not of fair average quality, and that the plaintiffs were not willing to deliver such timber as, by the contract, they were bound to deliver.

At the trial, before *Bramwell B.*, at the London Sittings after last Michaelmas Term, it appeared that the timber was sold by the plaintiffs to the defendant under the following contract:—

admissible to explain the contract, and that upon this evidence the contract must be construed as for timber of a fair average of Savannah pitch pine timber.

The plaintiff sold to the defendant, "deliverable in London, ex 'Ion,' from Savannah, 400 loads of pitch pine timber, at &c., the timber warranted of fair average quality, to be taken of fair average of the cargo." Evidence was given that pitch pine timber is an article which comes from several parts in Central America, and that pitch pine timber from Darien has more heart in it, being better buttred and with fewer holes than that from Savannah.—*Held*, that the evidence was

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" April 7th, 1857. Sold to Mr. F. A. Clarke &c. deliverable in London, ex 'Ion' from Savannah, and subject to her arrival there, 400 loads or more of pitch pine timber, at 4*l*. 5*s*. per load of 50 feet cube, per Customs measure, for cost, freight, and insurance only, the buyer paying all other charges. The timber, warranted of fair average quality, is to be taken of fair average of the cargo, and, as far as possible, following Customs numbers. Payment by acceptance at six months from arrival of ship, allowing ten days for delivery.

" JONES & NASH."

Pitch pine timber is an article which is exported from several places in Central America. The plaintiffs' witnesses proved that pitch pine timber from Darien is of superior quality to that from Savannah; that from Darien, as it arrives, being better squared and butted, and having fewer plug holes, so that the purchaser gets more heart out of a given quantity. They stated that the timber in question was a fair average of Savannah pitch pine timber. The defendant's witnesses stated that, if Savannah pitch pine timber was well prepared, it was as good as Darien, and that this timber was full of sap and not of fair average quality. The learned Judge left it to the jury to say whether the cargo was a fair average cargo of pitch pine timber of Savannah. The jury found a verdict for the plaintiffs.

Cleasby now moved for a new trial on the ground of misdirection.—According to the true construction of the contract, the defendant was entitled to have pitch pine timber of fair average quality, without reference to the place from which it came, that is to say, of fair average quality to the consumers.

POLLOCK, C. B.—I am of opinion that the learned Judge

was right in the view he took at the trial. To satisfy the warranty, the cargo must be a fair average of the various sorts of the article which come from the port. The comparison must be with those things which would be present to the minds of the contracting parties when dealing for the article. There are many departments of commerce in which people know only the market in which they deal. Wine from a particular place of fair average quality, does not mean of fair quality taking the average of wines in general.

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MARTIN, B.—I also think that my brother *Bramwell's* ruling was correct. The plaintiff had a right to establish by evidence the fact that there was a known difference between pitch pine timber from Darien and that from Savannah, and to shew that the former was better squared and butted than the latter. These facts being established the contract must be read with reference to them, and then it would appear that the fair average spoken of meant a fair average of Savannah pitch pine timber. A vast variety of cottons are brought to market; from amongst other places America, India, and Egypt; no average could be made of these various sorts of cottons.

BRAMWELL, B.—I retain the opinion I expressed at the trial. The plaintiffs had clearly a right to prove the extrinsic facts given in evidence. This was a sale of the timber in the state in which it ordinarily arrives. The two sorts of pitch pine timber arrive in different plights of which no average could be made. The evidence therefore shews that the true construction of the agreement is, that the timber was to be of fair average quality as Savannah pitch pine timber.

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CHANNELL, B.—I agree with the rest of the Court in thinking that the evidence was properly received to explain the meaning of the contract.

Rule refused.

Deed v. S. 271. 736.

Alice Vose, Administratrix of EDWARD VOSE, Deceased,
v. THE LANCASHIRE AND YORKSHIRE RAILWAY COM-
PANY.

Jan. 18.

A servant in the employment of the E. L. Company, engaged in repairing a carriage in a siding at a station in the joint occupation of the E. L. Company and the L. and Y. Company, was killed by an engine of the L. and Y. Company being shunted into the siding at which he was at work. It appeared that rules for the regulation of the station were published, headed in the joint names of the two Companies; and that the servants employed in shunting the engines were the joint

THE declaration, by Alice Vose, administratrix of Edward Vose, her husband, stated, that the defendants, after the passing of 9 & 10 Vict. c. 93, were possessed of a locomotive steam-engine, which was then upon a certain station, in which, and in a certain siding thereon, the said E. Vose was lawfully employed in mending certain waggons, which steam-engine was being moved about and drawing certain waggons under the care, management, and control of the defendants' servants: that it was the duty of the defendants and their servants to use due and proper care, skill, and diligence in and about the management of the said steam-engine and waggons; yet the defendant so carelessly, improperly, negligently, and unskilfully managed the said steam-engine, and took so little care in such management, that by the wrongful act, neglect, &c., of the defendants and their servants, the steam-engine and waggons were driven against the said waggons, one of which the said E. Vose was engaged in mending, and thereby E. Vose was violently struck, &c.; and was killed, within less than twelve calendar months before suit; and the plaintiff, as

servants of the two Companies, but the engine drivers and persons employed, as the deceased was, in repairing the carriage, were the separate servants of each Company. It was found that the rules as to the precautions to be taken before shunting trains into sidings, had been observed, and that there had been no negligence on the part of the deceased, the shunter, pointsman or engine driver; but that the accident was occasioned by the rules being defective.—*Held*, that the L. and Y. Company were liable to an action at the suit of the administratrix of such servant.

such administratrix, &c., sues by virtue of the said Act, for the benefit of herself, the widow of the said E. Vose, and for John Vose and others, children of the said E. Vose.

Plea: Not guilty.—Whereupon issue was joined.

At the trial before *Watson*, B., at the last Liverpool Assizes, it appeared that the deceased was a blacksmith in the employ of the East Lancashire Railway Company. The station in Liverpool is in the joint occupation of that Company and the Lancashire and Yorkshire Railway Company, and on each side of the line is a siding; that on the West belonging to the East Lancashire Railway Company, that on the East to the Lancashire and Yorkshire Railway Company. On the 10th of January, 1857, the deceased and one Clewly were told by the waggon inspector of the East Lancashire Railway Company, to put a new buffer on an East Lancashire waggon in the siding of that Company. When waggons required only slight repairs such repairs were ordinarily done in the sidings. On this occasion the deceased and Clewly were working between the waggons of which there were several on the siding; and the noise occasioned by rivetting on the buffer made it almost impossible for them to hear anything. An engine belonging to the Lancashire and Yorkshire Railway Company, and driven by one of their drivers, pushed two waggons belonging to the Lancashire and Yorkshire Railway Company into the siding where the deceased was at work, and killed him on the spot. The deceased from his position was unable to see the engine as it came up. Neither engine driver, shuntsman, or pointsman could see a person working at a buffer in the position of the deceased. The deceased had not given notice to the shuntsman or pointsman that he was working in the siding.

The practice as to shunting the waggons into the siding

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was as follows:—The pointsman keeps up a red signal. As the engine comes up the engineman whistles till, on a signal from the shuntsman, the red signal is taken down. As soon as the red signal is down, the engine comes on to the pointsman's stand and passes it. The shuntsman looks to see that no waggons are in the way, and if he sees none gives a signal to the engineman. The shuntsman then uncouples the waggons. The engineman cannot come into the siding, unless the pointsman turns the points and the shuntsman uncouples the waggons. There was a conflict of testimony, as to whether or not the engineman had whistled on approaching the siding in order to shunt the carriages.

On the part of the defendants, it was alleged that the sidings were used by the two Companies in common. Some rules were put in headed,—

“LIVERPOOL JOINT LINE.

“Notice to pointsmen, signalmen, engine drivers, firemen, guards, breaksmen, porters, and platelayers.”

The 5th and 7th Rules were as follows:—

“5. All *engine drivers* and *firemen* are hereby instructed to go with caution on the joint line, especially between the North end of the Viaduct and the Exchange Station. Also out of the Tunnel towards Booth Lane Station. They are especially referred to the Rule Books of the respective Companies, viz., L. & Y. and E. L. Railway Companies, requiring vigilance and caution on their part.”

“7. *A Bell must be rung* by the pointsman as trains approach the hoists, to warn the porters and others employed there to keep themselves, horses and trucks clear of the main lines; but, irrespective of the ringing of the bell, it is requisite that they also keep a good look out to avoid danger from passing trains.”

The pointsmen, shuntsmen and some of the platelayers

were the joint servants of the two Companies. The drivers of engines, stokers and persons employed to repair carriages were the separate servants of each Company.

The learned judge asked the jury, first, whether the deceased was guilty of negligence. Secondly, he said that no railway Company by establishing rules can justify their servants in not taking due care of human life: if they drive waggons into a place where men may be at work, it is the duty of the Company to see that proper rules for the safety of such persons are established; and he asked the jury whether there was negligence; whether the shuntsman, pointsman, and driver did all that the rules of the Company required; and whether the accident was caused by the Company not giving proper directions to their servants? The jury found that the accident was owing to the defective rules, and that no person other than the defendants was guilty of negligence. A verdict was then entered for the plaintiff, and leave was reserved to the defendants to move to enter a verdict for them, if the Court should be of opinion that upon this finding they were entitled to it.

Hugh Hill, in the present term, obtained a rule to shew cause why the verdict should not be set aside and a verdict entered for the defendant, or a new trial had, on the ground that, upon the facts proved and found by the jury, the plaintiff was not entitled to recover. Also that the circumstance of the rules of the joint companies for the management and working of the station being defective, and such defect being the occasion of the death of the deceased, constituted no cause of action.

Overend and Brett shewed cause (Jan. 15).—The deceased was the servant of the East Lancashire Railway Company, and working for them in their own siding. He

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was killed by a Lancashire and Yorkshire engine driven by a servant of that Company, not by the negligence of a fellow servant. This is therefore not like the case of a person who voluntarily enters into a dangerous service; and the rules that have been laid down on that subject have no application. The real question is whether there was negligence, on the part of the owners or driver of the engine, which caused the death. Even if the deceased was in any sense the servant of the Lancashire and Yorkshire Company, it was the personal interference and negligence of that Company which caused the accident. The cases of *Paterson v. Wallace* (a) and *Roberts v. Smith* (b) shew that the Company is responsible. In the former case Lord *Cranworth* said:—"It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows or ought to know that it is not so; and if from any negligence in this respect damage arises the master is responsible." [*Pollock, C. B.*—That is merely a dictum of the Lord Chancellor in a Scotch case, not a decision of the House of Lords. *Martin, B.*—The difficulty is that the servant is not bound to expose himself to the risk.—*S. Temple, amicus curiæ.* In *Roberts v. Smith* the plaintiff could not have known that the scaffold was defective.]

Hugh Hill and *Blackburn*, in support of the rule.—The negligence was the negligence of the employer as well as of the Lancashire and Yorkshire Railway Company. The rules were the joint rules of the two, and both or either might have been sued. The deceased met his death by an ordinary risk incident to his employment. In *Shipp v. The Eastern Counties*

(a) 1 Macqueen, 748.

(b) 2 H. & N. 213.

Railway Company (a) a person in the employ of that company was injured in attaching trucks to a train, and evidence was given that the work was too much for the servants of the Company; it was held that the Company were not liable, and that it was not a proper question to leave to the jury whether the number of servants employed by the Company was sufficient for the performance of the work. That case establishes the principle that if a person enters into a service of danger, and, in the course of his employment, suffers an injury, the master is not liable. Where the injury arises from the subsequent interference of the master, the case may be different. In *Wiggett v. Fox* (b) a contractor was held not responsible for the death of a servant of a sub-contractor who was killed by the negligence of a servant of the contractor, they being in a common employ. In *Degg v. The Midland Railway Company* (c) a volunteer was held to be on the same footing as a servant. The observation of *Willes, J.*, in *Roberts v. Smith* (d) shews that the dictum of Lord *Cranworth* in *Paterson v. Wallace* (e) is not recognised as the rule in English cases. The law of Scotland is radically different from the law of England on this subject: *Brown v. M'Gregor* (f). To render the master liable, there must be evidence of personal interference and negligence after the employment of the servant has commenced. If the risk existed at the time of the commencement of the employment, and the servant knew, or had the means of knowing it when he entered into the service, the master is not liable.—They also referred to *Thorogood v. Bryan* (g.)

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(a) 9 Exch. 223.

(b) 11 Exch. 832.

(c) 1 H. & N. 773.

(d) 2 H. & N. 213.

(e) 1 Macqueen, 748.

(f) Cited 1 Macqueen, 753 n.

(g) 8 C. B. 115.

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POLLOCK, C. B., now said.—We are all of opinion that this rule must be discharged. The only question is, whether the verdict which was entered for the plaintiff should be set aside and a verdict entered for the defendants. The jury were asked if the defendants were guilty of negligence, and they found that question in the affirmative. They further found that no other person was guilty of any negligence, neither the deceased, the engine driver, the pointsman nor the shuntsman, and, in fact, have acquitted of negligence every person who could have contributed to the accident, except the defendants. The deceased was not the servant of the defendants, but of the East Lancashire Railway Company. Under these circumstances the defendants do not complain of the direction of the learned Judge, nor would any such complaint be well founded; and the finding of the jury is not impeached. I do not mean to find fault with the verdict; nor do I say whether I should have so found, though I believe my learned brothers concur in it; but, upon the question before us, it being found by the jury that there was negligence on the part of the defendants and none on the part of any other person, we must give effect to that finding or grant a new trial. The latter we cannot do. In my opinion we ought to be extremely cautious not to relax the rule originally laid down in this Court, that with respect to servants in a common employ, the master cannot be made answerable for an injury caused to one servant by the negligence of another. Few rules of law are of greater practical importance. The law must have been the same long before it was enunciated in this Court in the case of *Priestley v. Fowler* (a). If not, such actions would have been of frequent occurrence. No such action, however, appears ever to have been brought before the decision of that case. We

(a) 3 M. & W. 1.

ought not to allow so important a decision to be frittered away by minute distinctions or the ingenuity of advocates. But that rule of law does not apply to the facts of the present case. It is impossible that we can order the verdict to be entered for the defendants; and on these grounds, in which the rest of the Court (*a*) concur, the rule must be discharged.

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Rule discharged.


(*a*). *Martin, B., Watson, B., and Channell, B.*

ISAAC PRESTON, Clerk to the Commissioners of the
HAVEN OF GREAT YARMOUTH, v. THE NORFOLK
RAILWAY COMPANY AND THE EASTERN COUNTIES
RAILWAY COMPANY.

Jan. 26.

THE declaration stated that, by "The Great Yarmouth Haven Bridge and Navigation Act, 1835," (5 & 6 Wm. 4, An Act, 7 & 8 Geo. 4, c. xlii., for making a navigable

communication for ships between the city of Norwich and the sea, empowered the Company of Proprietors of the Norwich and Lowestoft Navigation to erect a lock or sluice, with proper stop-gates, to prevent the waters of a broad and certain navigable rivers from flowing into a certain lake, and to make an entrance cut from that lake to the sea. Section 3 provided, that nothing in the Act contained should authorize or enable the Company to divert or abstract any of the waters of the said broad or rivers for any purpose whatsoever, except for the purpose of supplying certain intended cuts with water, and for the purposes of locking ships or vessels from or into the said lake. This entrance cut from the lake into the sea was constructed under the said Act, and the level of the water in the lake was kept lower than the level of the broad and rivers. The lock was made with proper gates in pursuance of the Act. By divers acts of parliament, and ultimately by 9 & 10 Vict. c. cxxxii., the said lock and works became vested in the Norfolk Railway Company. By an agreement between the Norfolk Railway Company and the Eastern Counties Railway Company, reciting that the works, including the lock in question had become vested in the Norfolk Railway Company, it was provided that "The Eastern Counties Railway Company should have, as between themselves and the other Company, (but subject to such division and apportionment of gross receipts as is therein mentioned,) the exclusive possession, use, enjoyment and receipt of all the property, rights, &c., of the works respectively in the same manner as the Norfolk Railway Company have become entitled to the same under or by virtue of the respective Acts, &c., or otherwise: That the Eastern Counties Company should at all times repair and keep up the said works with the appurtenances," &c.; and that the powers of the Norfolk Railway Company should be exercised by the Eastern Counties Company. Other clauses provided for the division of the profits in certain proportions after deducting the working expenses, which were to be borne by the Eastern Counties Company. Clause 29, provided for the appointment of a joint committee of directors of the three Companies to superintend the working of the railways. By 17 & 18 Vict. c. ccxx. s. 2, the agreement was

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c. xlix.) (a) it was enacted, that it should be lawful for the said Commissioners and they were thereby required to support, &c., the Haven of Great Yarmouth, &c., and to clear and deepen part of the river Wensum, called the river Yare, and also to clear and deepen that part of the river Yare called Braydon and Burgh Flats, for making the same navigable for wherries and keels; and that it should be lawful for the Commissioners to receive and recover duties for vessels entering into, or departing from the Haven: that the Commissioners are liable to support the haven, and were and are entitled to demand the said duties. That the haven

confirmed; and by s. 11, the Eastern Counties Company were to use, work, regulate and manage the five undertakings (in the Act mentioned) as if they were one undertaking. By s. 12, "the powers granted to the Companies respectively, by virtue of the recited Acts, or any of them, with respect to the user, working, regulation and management of their respective railways, works and undertakings, &c., were to be exercised and enjoyed by the Eastern Counties Railway Company, &c., under the same regulations and restrictions as were, by the recited Acts relating to that Company, imposed on that Company. After the making of the agreement, the Eastern Counties Railway Company entered into possession of the lock and works, and the Norfolk Railway Company were not in possession. At the time of the making of the agreement, the lock had been allowed to become out of repair, and such want of repair continued after the lock and works came into the possession of the Eastern Counties Railway Company; and during all that time large quantities of water escaped from the broad and rivers into the lake.—*Held:* First, that such water was diverted or abstracted contrary to the prohibition in 7 & 8 Geo. 4, c. xlii. s. 3. Secondly, that the Norfolk Railway Company were not responsible for the diversion or abstraction of the waters subsequent to the making of the agreement, and the passing of 17 & 18 Vict. c. cxx., while the lock and works were in the possession of the Eastern Counties Railway Company.

(a) By 5 & 6 Wm. 4, c. xlix. s. 4, the property of the Commissioners under the former Act is vested in the Commissioners under that Act.

By s. 35, it is enacted, that "It shall be lawful for the said Commissioners, and they are hereby required to support, repair, and maintain the said Haven of Great Yarmouth * * * And also to clear and deepen that part of the river Yare, leading from Great Yarmouth to the city of Norwich, commonly called Braydon and Burgh Flats, for making the same navigable for wherries and keels usually passing upon

the same," &c.

Section 42 imposes duties on vessels entering the Haven of Great Yarmouth, &c., and on imports and exports.

By s. 93, the Commissioners shall out of the duties pay to such person as the justices of Norfolk shall appoint, the amount of the sum for which the justices shall have delivered in an estimate, &c., "to be applied for and towards the cleansing and deepening the said river Waveney in such manner as the said justices in quarter sessions assembled, shall order and direct."

is an ancient haven formed by the influence of the rivers Wensum, otherwise Yare, Waveney, and Bure, being navigable rivers: that, until the making of certain Acts hereinafter mentioned, all the waters of certain streams connected with them, viz., Oulton Broad, Oulton Dyke and Lake Lothing ran and flowed into the said haven, and through the same to the sea, and that the ancient course of the said waters to the sea was through the said haven. That by an Act (7 & 8 Geo. 4, c. xlii.) "The Company of Proprietors of The Norwich and Lowestoft Navigation" were authorized to make certain cuts, &c., between the rivers Wensum and Waveney, and a certain lock between Oulton Broad and Lake Lothing, and a certain entrance cut or communication between Lake Lothing and the sea; and it was enacted that nothing in that Act contained should authorize the Company to divert or abstract any of the waters of the said rivers or either of them, or any of the waters, streams or springs connected with such rivers (save and except the waters of Lake Lothing) for any purpose whatever, except for the purpose of supplying the cuts by the last mentioned Act authorised to be made, with water, and for the purpose of locking ships or vessels from or into Lake Lothing, and for such other locking of ships or vessels as might at any time be required in any other part of the intended navigation. That the said works, basins, cuts and harbours (hereinafter called the "navigation works and harbour") were made. That, by virtue of the powers given by The Lowestoft Railway and Harbour Act, 1845, (8 & 9 Vict. c. xlv.) The Lowestoft Railway and Harbour Company purchased from the Company of Proprietors of The Norwich and Lowestoft Navigation the said "navigation works and harbour." That by an Act for enabling the Norfolk Railway Company to purchase or lease the Lowestoft Railway, Harbour and Navigation, (9 & 10 Vict.

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c. cxxxii.) it was enacted that The Norfolk Railway Company should execute the works which the said Lowestoft Railway and Harbour Company were authorized to construct; and by the Norfolk Railway (Lowestoft Harbour Improvement) Act, 1854 (17 & 18 Vict. c. cxxx.), certain further powers were given for altering, enlarging, deepening and improving Lake Lothing, and for improving Lowestoft Harbour; and it was thereby enacted that nothing therein contained should be deemed to authorize or enable the Norfolk Railway Company to divert or abstract any of the waters of the rivers Wensum and Waveney, or any of the waters, streams or springs connected with such rivers, other than and except so far as the Company of Proprietors of the Norwich and Lowestoft Navigation were (by 7 & 8 Geo. 4, c. xlii.) authorized or enabled to divert and abstract the same. That, before the committing of the grievances, the several railways, works and undertakings belonging to the Norfolk Railway Company, including Lowestoft Harbour and the said "navigation, works and harbour," had been (under and by virtue of 17 & 18 Vict. c. ccxx.) used, worked, regulated and managed by the defendants, the Eastern Counties Railway Company; and thereby it became the duty of the defendants, the Norfolk Railway Company and the Eastern Counties Railway Company, not to divert or abstract any of the waters of the rivers Wensum and Waveney, or any of the waters connected with the said rivers (save and except the waters of Lake Lothing) for any purpose except those mentioned in, and authorized by the 7 & 8 Geo. 4, c. xlii. Breach.—That the defendants wrongfully and unlawfully diverted large quantities of the rivers Wensum and Waveney and of Oulton Dyke and Oulton Broad from and out of the same, and abstracted large quantities of the said waters, the same not being for any of the purposes mentioned in

and authorized by 7 & 8 Geo. 4, c. xlii., and hindered the waters of the rivers &c. from flowing into the haven of Great Yarmouth, and thereby the depth of the water in the haven and the rivers is diminished, so that vessels cannot navigate the same, the harbour is rendered less commodious, and the Commissioners are made subject to greater expense than they otherwise would have been in cleansing and deepening the rivers and maintaining the haven, &c.

The second count alleged that the Great Yarmouth Haven Bridge and Navigation Act, 1835, (5 & 6 Wm. 4, c. xlix.) was still in force; that the Commissioners were liable to support, repair and maintain the haven of Great Yarmouth, and entitled to the duties in the first count mentioned: that the haven was formed, and as in the first count mentioned, the rivers Wensum, Waveney, and Bure, were public navigable rivers: that the waters of the rivers of Oulton Broad and Oulton Dyke had always run and flowed, and at the times of the commission of the grievances of right ought to have run and flowed, and still of right ought to run and flow into the haven and through the same into the sea. Breach.—That the defendants wrongfully and unlawfully diverted and turned large quantities of the waters of the rivers Wensum and Waveney and of Oulton Dyke and Oulton Broad, from and out of the same, and abstracted and took away large quantities of the said waters, and prevented the waters of the rivers, Oulton Broad and Oulton Dyke from flowing through the haven of Great Yarmouth as they ought to have done, whereby the depth of the waters in the haven and in the rivers is diminished, and the Commissioners are put to greater expense than they otherwise would have been in supporting, repairing and maintaining the haven.

Third count.—That by "The Great Yarmouth Haven, Bridge and Navigation Act, 1835," it was enacted, as in

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the first count mentioned; that the Commissioners are liable to support, repair and maintain the haven, and entitled to receive the duties, &c.: that the haven is an ancient haven formed, as in the first count mentioned, and that the ancient and natural course of the rivers was and is through the haven: that by the 7 & 8 Geo. 4, c. xlii., it was enacted, that it might be lawful for the Company of proprietors of the Norwich and Lowestoft Navigation, and they were thereby authorized and empowered, to erect, make and maintain, at or near the place where Oulton Broad and Lake Lothing communicated with each other, a lock or sluice, with proper and sufficient stop-gates to prevent the fresh waters of the said Broad, Dyke, and the rivers, in the first count mentioned, from flowing into Lake Lothing, and also to prevent the tidal waters of the sea from flowing into the said Broad, Dyke, and rivers: that the lock was made by virtue of the authority aforesaid—(The count then stated, that by the several Acts in the first count mentioned, the navigation works and harbour, including the lock and sluice, became vested in the Norfolk Railway Company)—That by the 17 & 18 Vict. c. cccx., reciting that an agreement dated the 6th of February, 1854, had been made between the Eastern Counties Railway Company of the first part, and the Norfolk Railway Company of the third part; for the working and management, by the Eastern Counties Railway Company, of the railways, works and undertakings belonging to or under the control of the Norfolk Railway Company; it was enacted that the Eastern Counties Railway Company might, and should use, work, regulate and manage the several works and undertakings to which the agreement related, as if they were the undertakings of that Company; and that the Eastern Counties Railway Company should be subject to the obligations by the several Acts imposed on the other Company: that from the passing of the last mentioned

Act, the said navigation works and harbour, and the lock and sluice have been worked, regulated and managed by the Eastern Counties Railway Company: that by reason of the premises it became the duty of the defendants to keep in repair the lock and sluice with proper stop-gates to prevent the waters of the rivers Broad and Dyke from flowing into Lake Lothing. Breach.—That the defendants, knowing the premises, did not maintain or keep in repair the said lock or sluice with proper stop-gates but permitted the same to be in great decay, and by reason thereof large quantities of the fresh waters of the Broad, Dyke, and rivers Wensum and Waveney flowed into Lake Lothing, to the injury of the Haven of Great Yarmouth, and of the navigation of the rivers Yare and Waveney, and of the Commissioners of the haven, &c.

Plea: Not guilty (a).

Particulars delivered, pursuant to a Judge's order, stated that the action was brought to recover damages for the diversion and abstraction by the defendants of the waters of the rivers Wensum and Waveney and Oulton Dyke and Oulton Broad at various times, between the 6th day of February, 1864, and the commencement of the action.

The cause came on to be tried before *Coleridge, J.*, at the last Summer Assizes for Suffolk, when a verdict was entered for the plaintiff, subject to a special case to be settled by an arbitrator. The third count was then added, and leave given to amend the particulars in respect of it.

The special case described the situation of the haven and rivers as in the declaration, and stated that the ancient and natural course of the rivers and their tributary waters, Oulton Broad, Oulton Dyke, and Lake Lothing had always been through the haven, that the rivers were navigable rivers; and that a sufficient depth of water for

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(a) There were other pleas (to a new assignment) which are not one of which the plaintiff pleaded necessary to be set out.

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the purposes of navigation is maintained by the scour of the tidal and back waters. The haven is a bar harbour. The action of the sea and flood tides continually throws up, and adds to, a bank of sand across the entrance called the Bar, and the rushing out of the ebb-tide and inland waters is of use in keeping down the height of the bar, by scouring away the sand brought in by the sea and flood tides. From the 22nd year of King Charles the Second till 1835, divers acts of parliament had been passed for clearing, deepening and improving the haven, and by the said Acts, powers were given to the Commissioners for carrying them into effect, of levying rates, and applying the same for the purposes of the Acts.

By the Great Yarmouth Haven Bridge and Navigation Act, 1835 (5 & 6 Wm. 4, c. xlix.), such of the former Acts as were then in force were repealed; and the property of the Commissioners, under the former Acts, was vested in the Commissioners appointed under that Act, who were required to support and maintain the Haven of Great Yarmouth, and to clear and deepen that part of the river Wensum or Yare, leading from Great Yarmouth to the city of Norwich, called Braydon and Burgh Flats, and for making the same navigable, and were required to provide money for the support of the rivers Yare, Bure, and Waveney. The river Waveney at one part of its course approaches within four miles of the sea at or near Lowestoft, and between that part of its course and the sea are Oulton Broad and Lake Lothing. There is a communication between Lake Lothing and Oulton Broad by Oulton Dyke. Lake Lothing approaches very near to the sea, but before the making of "The Norwich and Lowestoft Navigation Works," there was no communication between Lake Lothing and the sea; and the level of its waters was higher than the level of the sea for eight or nine hours in every twelve.

The waters of the Lake flowed into Oulton Broad and thence through Oulton Dyke into the river Waveney, and thereby tended to scour and deepen the Waveney, Burgh Flats and Braydon, and the harbour of Great Yarmouth, and to increase the amount of back water running out over the bar of the haven.

The case then set out the 2nd, 3rd and 6th sections of the 7 & 8 Geo. 4, c. xlii. (a). Shortly after the passing of this Act, the entrance cut between Lake Lothing and the sea, and the port called Lowestoft Harbour were made, and a lock was constructed at a point where Oulton Broad and Lake Lothing communicated with each other. The said lock, called Mutford Lock, had at each end thereof two pairs

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(a) By 7 & 8 Geo. 4, c. xlii. s. 2, it is provided (inter alia) that it should be lawful for the Company of Proprietors of the Norwich and Lowestoft Navigation, "to erect, make and maintain, at or near the point or place where the said (Oulton) Broad and Lake (Lothing) communicate with each other, &c.; a lock or sluice with proper and sufficient stop gates, to prevent the fresh waters of the said broad, dyke and rivers from flowing into the said lake, and also to prevent the tidal waters of the sea from flowing into the said broad, dyke and rivers, or into any of the lands adjoining thereto respectively, &c.; and also to make and maintain an entrance cut from the said lake called Lake Lothing, unto and through the sea shore into the sea, at or near the said parish of Lowestoft, in the county of Suffolk, &c."

Sect. 3. "Provided always, and be it enacted, That nothing in this Act contained shall authorize or enable, or be deemed or taken to authorize or enable the said Company of Proprietors, &c., to divert or abstract any of the waters of the said rivers Wensum, otherwise Yare and Waveney, or either of them, or any of the waters, streams or springs connected with such rivers or either of them (save and except the waters of Lake Lothing), for any purposes or purpose whatsoever, other than and except for the purpose of supplying the said intended cuts with water, and for the purpose of locking ships or vessels from or into the said lake, called Lake Lothing, and for such other locking of ships or vessels as may at any time be required in any other part or parts of the said intended navigation."

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of gates, one pair of which opened towards Oulton Broad for the purpose of preventing the waters of Oulton Broad, and other streams flowing into it, from flowing into Lake Lothing; and the other pair opened towards Lake Lothing for the purpose of preventing the waters of Lake Lothing and the tidal waters of the sea from flowing into Oulton Broad.

In the entrance cut between Lake Lothing and the sea is a pair of gates which have been left open almost as frequently as they have been shut. When the gates in the entrance cut are left open the level of the water of Lake Lothing at low water is from four to six feet below the level of the waters of Oulton Broad. When the gates are shut they are shut at high water, but the water is not all retained in Lake Lothing. Upon such occasions the practice is to open the sluices and to reduce gradually, by that means the water in the lake is about two feet below high water mark, and when so reduced the level of the lake is below the level of the waters of Oulton Broad, and so remains till the next flood tide.

The Lowestoft Railway and Harbour Company, in pursuance of the 8 & 9 Vict. c. xlv., purchased the Norwich and Lowestoft navigation and harbour. By the 9 & 10 Vict. c. cxxxii., it was enacted that the Norfolk Railway Company, should execute the works which the Lowestoft Railway and Harbour Company were authorized to construct, &c.; and should have, use and exercise the powers, and be subject to the regulations and restrictions, by the same Act granted to and imposed upon the Lowestoft Railway and Harbour Company, as fully as if the Norfolk Railway had been the Company constituted by the last mentioned Act.

The case then set out the 11th section of 17 & 18 Vict.

c. cxxx., the Norfolk Railway (Lowestoft Harbour Improvement) Act 1854 (a).

On the 6th of February, 1854, an agreement was made between The Eastern Counties Railway Company, The Eastern Union Railway Company, and The Norfolk Railway Company, by which the Eastern Counties Railway Company became entitled to the exclusive possession, use, enjoyment and receipt of all the property, rights, rates, tolls, &c., of the Lowestoft Harbour Navigation, as from the 1st of January 1854; and were to maintain, renew and keep up the Lowestoft Harbour and Navigation, and to indemnify the Norfolk Railway against all damages by reason of any default on the part of the Eastern Counties Railway in not repairing or keeping up the Lowestoft Harbour and Navigation.

By the 17 & 18 Vict. c. ccxx., the said agreement was confirmed (b).

(a) Sect. 11 reciting the 7 & 8 Geo. 4, c. xlii. s. 3, enacts: "That nothing in this Act contained shall authorize or enable, or be deemed or taken to authorize or enable the Norfolk Railway Company, &c., to divert or abstract any of the waters of the said rivers Wensum, otherwise Yare, and Waveney, or either of them, or any of the waters, streams, or springs connected with such rivers, or either of them, other than and except so far and to such extent as the Company of Proprietors of the Norwich and Lowestoft Navigation, were by the act of parliament by which such Company were incorporated, authorized and enabled to divert or abstract the same, nor authorize or enable the Norfolk Rail-

way Company in anyway to abrogate or destroy, or in any degree infringe the said recited provision.

(b) The agreement between the Eastern Counties, the Eastern Union and the Norfolk Railway Companies, reciting, amongst other things, that the Lowestoft Harbour and Navigation had become and was vested in the Norfolk Railway Company, provided as follows:—Sect. 5, "the Eastern Counties Railway Company shall be entitled, and shall have as between themselves and the other two Companies parties thereto (not subject to such division and apportionment of gross receipts as is hereinafter mentioned), the exclusive possession, use, enjoyment and

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From the 6th of February, 1854, the railways and works of the Norfolk Railway Company, including the Norwich and Lowestoft Navigation and Mutford Lock, have been and are in the possession of, and used, worked, regulated and managed by the Eastern Counties Railway Company, and the Norfolk Railway have not had any possession of or in any manner interfered therewith.

For some time previous to the month of December 1852, the Mutford Lock and Gates had become out of repair, and were gradually decaying. On the 6th of February, 1854, they were very much out of repair, and have continued so down to the period at which this action was brought.

receipt of all the property, rights, &c. * * * of the Lowestoft Railway Harbour and Navigation respectively in the same manner as * * * the Norfolk Railway Company have acquired or become entitled to the same, under or by virtue of the respective Acts &c. or otherwise."

Sect. 16. "The Eastern Counties Railway shall and will at all times, &c., repair and keep up the said Lowestoft Harbour and Navigation with the appurtenances, &c."

Sect. 19 provided that the powers of the other Companies should be exercised by the Eastern Counties Company.

Sects. 21, 22, 23, provided for the division of the profits in certain proportions, after deducting the working expences which were to be borne by the Eastern Counties Railway.

Sect. 29 provided for the appointment of a joint Committee of directors of the several Com-

panies to superintend the working of the railway.

By 17 & 18 Vict. c. ccix. s. 2, this agreement was confirmed; and by sect. 11 "the Eastern Counties Railway are to use, work, regulate and manage the five undertakings (in the Act mentioned) as if they were one undertaking.

Sect. 12. "The powers and privileges granted to and which might be exercised and enjoyed by the four Companies respectively * * * by virtue of the recited Acts or any of them, with respect to the user, working, regulation and management of their respective railways, works and undertakings, &c., may and shall be exercised and enjoyed by the Eastern Counties Railway Company, &c., under the same regulations and restrictions as are by the recited Acts relating to that Company imposed on that Company, &c."

In consequence of the state in which they were, large quantities of water constantly passed through them into Lake Lothing at all such times as the gates in the entrance out between Lake Lothing and the sea were left open. The quantities of water which passed through the lock and gates substantially diminished the scouring power of the Waveney in its course to the Haven of Yarmouth and the sea there. The defendants were aware of the state of the lock and gates, and that in consequence of the state in which they were the waters did pass through them.

There has been from time to time a deposit of silt in that part of Burgh Flats which lies above the part where the rivers Waveney and Bure unite. This deposit of silt is injurious to the navigation, and the Yarmouth Haven Commissioners have been put to considerable expense in dredging the silt.

The question for the opinion of the Court is, whether the plaintiff is entitled to succeed in this action against both or either, and which of the defendants; and on all or any, and which of the issues joined. In case the plaintiff is entitled to succeed the damages are to be 40s.; and the Court is to direct how the verdict is to be entered, &c.

Couch (with whom was *O'Malley*), for the plaintiff (*a*).—The 7 & 8 Geo. 4, c. xlii. s. 3, shews that the defendants are not at liberty to “divert or abstract any of the waters” of the rivers Wensum and Waveney, or any of the waters connected with such rivers except for the purposes therein mentioned. The words are to be taken most strongly against the Company, and must be construed as meaning something more than an active diversion or abstraction of the water. The Company would clearly be liable if they

(*a*) In Michaelmas Term, Nov. *Bramwell*, B., *Watson*, B., and 9 & 16. Before *Pollock*, C. B., *Channell*, B.

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left the gates open after locking vessels into the Lake, and so allowed water to escape from Oulton Broad. *The Rochdale Canal Company v. King* (a) shews that the use of the water for any other purpose than that authorized by the Act is an invasion of the rights of the Commissioners. If insufficient gates had been put up in the first instance, and the water had been allowed to escape from the Broad into Lake Lothing, that would have been a diversion. The diversion of part of a public navigable river, whereby the current is weakened and rendered less fit for navigation, is a common nuisance: Hawk. P. C. c. 76, s. 11. The construction of the works, except for the authority of parliament, would have been a public nuisance. The Company must therefore confine themselves strictly to what the Acts enable them to do. It is not necessary to shew that the Commissioners have sustained an actual loss of profit: *Dickinson v. The Grand Junction Canal Company* (b), *The Glamorganshire Canal Company v. Blakemore* (c). It is said by the defendants that the waters of the rivers are not decreased in volume, but it is shewn that the scouring power of the rivers is diminished. It is not necessary to shew actual pecuniary damage where an injury is done to a right: *Northam v. Hurley* (d), *Embrey v. Owen* (e). Then it is said that the defendants cannot both be liable to this action. But the Norfolk Railway Company are liable because they put the Eastern Counties Railway Company into possession of the lock when it was in the state complained of. *Rosewell v. Prior* (f) shews that if A., tenant for years erects a nuisance and afterwards makes a lease to B., the party injured may have an action against either A. or B. That case was recognized

(a) 14 Q. B. 122.
 (b) 7 Exch. 282.
 (c) 1 Cl. & F. 262.

(d) 1 E. & B. 665.
 (e) 6 Exch. 353.
 (f) 2 Salk. 460.

in *Rich v. Basterfield* (a). The agreement is in the nature of a partnership. The Norfolk Railway Company cease to be carriers; but the business is under the superintendence of a joint committee, and the profits are to be shared between the two Companies. There is no clause in the 17 & 18 Vict. c. ccxx. exonerating the Norfolk Railway Company; though, by the former Act (9 & 10 Vict. c. cxxxii. s. 8), by which the works were transferred to the Norfolk Railway, the Lowestoft Railway Company were expressly exonerated. [*Pollock*, C. B.—We cannot construe one local Act by comparing it with a provision in another Act of the same character.] The Act does not transfer the ownership. The position of the parties is analogous to that of master and servant.

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Byles, Serjt., (with whom was *Tozer*), for the Eastern Counties Railway Company.—There is no evidence of a misfeasance. The arbitrator has not found that any damage has been caused. The cases do not shew that the defendants are responsible except for actual misfeasance. In *The Rochdale Canal Company v. King* (b) there was a diversion by pipes; in *Dickinson v. The Grand Junction Canal Company* (c) by pumping; in *The Glamorganshire Canal Company v. Blakemore* (d) the Company had enlarged their canal. If there is a breach of a public duty, no action lies unless the complainant has sustained a particular damage: *Wilkes v. The Hungerford Market Company* (e), Co. Lit. 56, a. No right could be gained against the plaintiffs by allowing the water to escape through the lock, because they are only trustees for the public. [*Bramwell*, B.—It appears that the nature

(a) 4 C. B. 783.

(d) 1 Cl. & F. 262.

(b) 14 Q. B. 122.

(e) 2 Bing. N. C. 281.

(c) 7 Exch. 282.

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of the rivers renders an undiminished scouring power desirable.]

Unthank (with whom was *Wells*, Serjt.,) for the Norfolk Railway Company.—It may be conceded that if a right is invaded, an action will lie without proof of special damage; but here the Commissioners have no right. The haven is a public harbour; the Commissioners have no property in the water of the rivers, but only a particular power with respect to the haven and rivers. By the particulars of demand the claim is limited to the abstraction of water subsequent to the 6th February, 1854, since which time the Eastern Counties Railway Company have had exclusive possession of the lock and cut in question; and, by the effect of the agreement and of the 17 & 18 Vict. c. ccxx., the whole right is taken out of one Company and given to the other. It is a sufficient answer to the first and second counts to say that the Norfolk Railway did not divert the water, because that could only be done by the Company in possession of the lock at the time of the diversion. As to the third count they are not liable for the non-repair of the lock. A landlord who has erected a nuisance and let it to a tenant, may be liable to an action, but not where that which is complained of is only a nuisance by reason of user subsequent to the letting: *Rich v. Basterfield* (a).

Couch, in reply.—The Commissioners are liable to be called upon under 5 & 6 Wm. 4, c. xlix. s. 93, to expend money in cleansing and deepening the Waveney, but they have no power to increase the tolls. Anything which tends to increase their expenses is an injury to their right. It is a fallacy to say that there has been only a violation of a

(a) 4 C. B. 783.

public right. It is a species of private right, and a particular injury is sustained by the Commissioners.—He referred also to *The Rochdale Canal Company v. Walmsley (a)*.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—No question is raised here either in the special case or in the argument as to whether the action is maintainable, even if the facts are as stated by the plaintiff. We are only to decide how the issues are to be found. We may at once say that, as the others must be found for the plaintiff, the only question is on the plea of “not guilty.”

The first two counts of the declaration charge the defendants with diverting and abstracting water; the third with omitting to repair certain locks whereby water escaped. Now it is clear that, on the plea of “not guilty,” as to the first and second counts, the Norfolk Railway Company must have a verdict, as the particulars limit the plaintiff’s claim to a period beginning February 6th, 1854, since which time it is found by the case that the Norfolk Railway Company has not been in possession of any of the works. They cannot therefore have done any of the acts complained of by the first and second counts. Certainly, since the 17 & 18 Vict. c. ccxx., the Norfolk Railway Company has done nothing of that, the doing of which the plaintiff complains of. They are, at least, therefore, not joint wrong doers with the other defendants for the entire period.

With respect to the other defendants they have *done the acts* complained of since that date: that is to say, they have been in possession of the works, and, through and by means of the cut into the sea, Lake Lothing

(a) 14 Q. B. 136, note.

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has been lowered; and thereby (there not being a sufficient protection by locks) water has escaped from Oulton Broad and Oulton Dyke into Lake Lothing and so into the sea. In truth, then, the defendants by the works do abstract and take water contrary to the prohibition in 7 & 8 Geo. 4, c. xlii., s. 3. If efficient locks were there, they would not do so; but, as there are not efficient locks, they do, by these works, that which they are prohibited from doing. It is a mistake to say that there is only a nonfeasance; they maintain and use that which, without a safe-guard, taps Oulton Broad and lets its waters escape, therefore they abstract and take the water. The verdict, therefore, as to the first and second counts, must be entered against them.

The third count alleged that the defendants did not maintain a lock or sluice with proper stop-gates, assuming it was their duty to do so—a matter by no means clear, as any other mode of preventing an abstraction of water by the works would be as good, so far as the plaintiffs are concerned, as maintaining the locks. However this question was not made. Perhaps the count is good as an inartificial mode of stating an abstraction of water by the defendants, and in that case must receive the same decision as the other counts. We will, however, deal with it on the footing on which it was argued, viz., as a charge of nonfeasance in reference to an admitted duty. The plea of not guilty must be found in favour of the Norfolk Railway Company, for they cannot be jointly liable for a portion only of the claim. As to the Eastern Counties Railway Company, no doubt they omitted to maintain the locks, sluices and gates as alleged, that is to say, they did not maintain them. But it was said that, nevertheless, no action lay, unless there was a particular damage to the plaintiff. As we have said, we do not decide if any would lie then; but, as a matter of fact, under the power reserved

to us, we have no difficulty in finding there was a particular damage. It is stated that "the scouring power of the Waveney was substantially diminished, in its course to the haven and the sea, by the abstraction of the water," for which the defendants are liable. It is also found "that the rushing out of the ebb tide and inland waters has been and is of use in keeping down the height of the bar," and it is found (as indeed is obvious) "that the water of Oulton Broad and Dyke increased the amount of back water running out over the bar." The plea of "not guilty," therefore, on the question raised before us, must be decided against the Eastern Counties Railway Company as to the third count. Our judgment, therefore, is a verdict against the Eastern Counties Railway Company for 40s. on all the issues; For the Norfolk Railway Company on Not guilty, and against them on the other issues.

Judgment for the plaintiff against the Eastern Counties Railway Company; for the defendants, the Norfolk Railway Company.

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 AND
 EASTERN
 COUNTIES
 RAILWAY Co.

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HANNEN had obtained a rule calling on the plaintiff to shew cause why an order of *Wightman*, J., for amending the writ of summons herein should not be rescinded, and why the teste of the writ should not be restored to its original date, and why in the meantime proceedings should not be stayed.

It appeared that instructions to issue the writ had been sent to the plaintiff's attorney in London, on Saturday, the 11th of July, 1857. The attorney being absent, and his clerk not adverting to the fact that the action would be barred by

The Court has no power to alter the date of a writ of summons. Where such an alteration is made by a Judge in order to prevent the operation of the Statute of Limitations, the defendant does not waive the objection by appearing to the writ after notice.

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the Statute of Limitations on the 13th (the last item in the plaintiff's particulars of demand being dated July 12th, 1851), the writ was not issued till Monday the 13th. Upon an affidavit of these facts, *Wightman, J.*, made an order that the plaintiff should be at liberty to amend the præcipe and writ of summons, by altering the date from the 13th to the 11th of July. After the present rule was granted, the defendant appeared to the action.

Petersdorff now shewed cause.—The defendant, by appearing, has waived the irregularity. [*Martin, B.*—This is not an irregularity. It is an act making a person liable for a debt from which the law has discharged him. It would deprive the defendant of the power to plead the Statute of Limitations, because the date of the writ must be taken to be the commencement of the action.] In order to save the Statute of Limitations the Courts have allowed various amendments to be made in writs of summons (*a*).—(*Hannen* referred to *Campbell v. Smart* (*b*).)

POLLOCK, C. B.—The words of the 5th section of The Common Law Procedure Act, 1852, are express:—"Every writ of summons shall bear date on the day on which the same shall be issued." The learned Judge had clearly no power to make the order.

MARTIN, B., and *CHANNELL, B.*, concurred.

Rule absolute.

(*a*) See Archbold's Practice, 9th ed., 186.

(*b*) 6 C. B. 196.

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Jan. 27.

THE declaration commenced by stating that the plaintiff, "who sues in this action as well for the Cheltenham Improvement Commissioners in whose district or borough of Cheltenham the offence hereinafter mentioned was committed by the defendant, as for himself in this behalf," by &c., his attorney, sues &c.: For that after the passing and coming into operation of the Cheltenham Improvement Act, 1852, whereby it was (among other things) enacted that the said Act should apply and be in force within and throughout the entire area comprised within the boundaries of the borough and parish of Cheltenham; and that the number of persons for executing the said Act should be thirty; and that they should be called "The Cheltenham Improvement Commissioners," and should be chosen for the term of three years, and that one-third of their number should retire annually, and that every such Commissioner going out of office, or otherwise, might (he being duly

A declaration, in a *qui tam* action, stated that the plaintiff and defendant were candidates for the office of Commissioner under the Cheltenham Improvement Act, 1852: that the plaintiff would have been elected, but that the majority of votes was in favour of the defendant, who was thereupon elected and acted as such Commissioner without being duly qualified: whereby the plaintiff was aggrieved as a ratepayer,

voter, and resident within the borough, and also as such candidate. The Cheltenham Improvement Act, 1852, incorporates section 15 of the Commissioners Clauses Act, 1847, which enacts that every person who shall act as a Commissioner without being duly qualified shall "be liable to a penalty of 50*l*., and such penalty may be recovered by any person." The Cheltenham Improvement Act, 1852, also incorporates section 133 of the Public Health Act, 1848, which enacts that no proceedings for the recovery of any penalty under that Act shall be taken "by any person other than by a party grieved, or the Local Board of Health in whose district the offence is committed, without the consent of the Attorney General; and if the application of the penalty be not otherwise provided for, one-half thereof shall go to the informer and the remainder to the Local Board of Health." The cause was tried and a verdict found for the plaintiff.

Held: First, that the plaintiff was not a "party grieved" by the defendant acting as such Commissioner.

Secondly, that the declaration was not authorized by section 15 of the Commissioners Clauses Act, 1847, and, under section 133 of the Public Health Act, it was bad in arrest of judgment, inasmuch as (the plaintiff not being a party grieved) it ought to have alleged the consent of the Attorney General.

Thirdly, that although the want of the consent of the Attorney General was an objection which might be taken by plea or demurrer, it was also a ground for staying the proceedings after trial.

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qualified in that behalf) be re-elected and become again a Commissioner, the plaintiff became, and during all the time hereinafter mentioned was a ratepayer, and was an elector and entitled to vote in and at the election of such Commissioners, within the true intent and meaning of the said statute, to wit, for the ward hereinafter mentioned, and resident within the said borough and boundaries aforesaid; and had in conformity and in accordance with the provisions of the said statute been duly elected, to wit, for the ward mentioned and referred to in the said Act as the west ward and described in the Schedule (A) annexed to the said Act, and acted as such Commissioner as aforesaid; and that the term of office of the plaintiff having expired, to wit, on the 20th day of November, 1856, he duly submitted himself and was a candidate for re-election to the said office of Commissioner, he being in all respects and particulars according to the said statute entitled and qualified to be such candidate and to act as such Commissioner, in case of his re-election; and that the defendant then also proposed himself at the same election for the north ward, as a candidate for the said office, the same being an election within the true intent and meaning of the statute in that behalf; and that divers votes were given for the plaintiff at such election and he would then have been re-elected such Commissioner as aforesaid, but that the majority of the votes at such election were given in favour of the defendant, who was thereupon chosen and elected such Commissioner as aforesaid. And the defendant did thereupon in pursuance of such election, and in acceptance of the said office, enter on and continue in the same and in performance and discharge of the duties thereof, and did act as such Commissioner as aforesaid, contrary to the form of the said statute, inasmuch as he the defendant was during all the time aforesaid wholly

ineligible to such office and unqualified for becoming, or being, or acting as such Commissioner as aforesaid, in this, to wit, that he the defendant was not during that time or any part thereof seised or possessed in his own right or in the right of his wife of real or personal estate or both to the value or amount of 1000*L.*, &c. (negating the qualifications required by the 14th and 15th sections of the Cheltenham Improvement Act, 1852), and was at the time of his said election and acceptance of the said office, and whilst he was acting as such Commissioner as aforesaid, entirely without any proper or sufficient qualification in that behalf, either by being seised or possessed of real or personal estate as in the said Act specified in that behalf, or by being rated as by the said Act specified in that behalf, or otherwise; and then acted as Commissioner without being duly qualified, contrary to the form of the said statute: Whereby and by reason of the premises, and the committing of the said offence by the defendant against the said statute, the plaintiff hath been injured and aggrieved as such ratepayer, voter, and resident as aforesaid; and also injured and aggrieved as such candidate as aforesaid, and hindered and prevented from being re-elected at the said election, and from being such Commissioner as aforesaid.—Averments: that every thing has happened and been done to entitle the plaintiff to issue a writ in this action as aforesaid, and to recover from the defendant the penalty of fifty pounds for the said offence so committed by the defendant as aforesaid, and to render the defendant liable thereto. Wherefore the plaintiff, suing as aforesaid, claims as well the said sum of fifty pounds on behalf of himself and the said Cheltenham Improvement Commissioners as full costs of suit according to the said statute.

Plea.—That the defendant is not indebted modo et formâ.—Issue thereon.

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At the trial, before *Willes J.*, at the Gloucestershire Spring Assizes, 1857, it appeared that, in the year 1846, the plaintiff and defendant, with two other persons, were candidates for the office of Commissioner under "The Cheltenham Improvement Act, 1852," (15 & 16 Vict. c. l.) when the defendant was elected and acted as a Commissioner, without being qualified as required by the 14th and 15th sections of that Act. This action was brought to recover from the defendant a penalty of 50*l.* by reason of his having so acted without qualification. The Cheltenham Improvement Act, 1852 (sect. 15), incorporates the 15th section of "The Commissioners Clauses Act, 1847," (10 & 11 Vict. c. 16), which enacts that "every person who shall act as a commissioner, being incapacitated or not duly qualified to act, &c., or after having become disqualified, shall for every such offence be liable to a penalty of 50*l.*, and such penalty may be recovered by any person, with full costs of suit, in any of the Superior Courts," &c. The Cheltenham Improvement Act, 1852 (sect. 127), also incorporates the 129th and 132nd sections of "The Public Health Act, 1848," (11 & 12 Vict. c. 63). The 129th section provides, "that in all cases in which the amount of any damages, costs or expences is by this Act directed to be ascertained or recovered in a summary manner, the same may be ascertained by and recovered before two justices, &c. The 133rd section enacts "That no proceedings for the recovery of any penalty incurred under the provisions of this Act shall be had or taken by any person other than by a party grieved, or the Local Board of Health in whose district the offence is committed, &c., without the consent in writing of her Majesty's Attorney General first had and obtained, &c.; and if the application of the penalty be not otherwise provided for, one-half thereof shall go to the informer and the remainder

to the Local Board of Health of the district in which the offence was committed."

It was objected on behalf of the defendant that the action was not maintainable, inasmuch as the plaintiff was not a "party grieved" by the defendant acting as a commissioner, and the consent of the Attorney General had not been obtained as required by the 133rd section of The Public Health Act, 1848 (a). The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

J. J. Powell, in Easter Term 1857, obtained a rule nisi accordingly, or to arrest the judgment.

Against this rule cause was shewn in the following Term (June 4) by the *Solicitor General* and *Prentice*, and *Powell* was heard in support of the rule. During the argument the Court intimated a doubt whether the objection as to the want of the consent of the Attorney General could be raised on this rule, and whether the proper course was not to move to stay the proceedings. *J. J. Powell* (June 12) obtained a rule nisi accordingly, upon affidavits that the consent of the Attorney General had not been obtained; and in Michaelmas Term (Nov. 13) cause was shewn against this rule.

Arguments for the plaintiff.—First, the consent of the Attorney General was not necessary. The provisions in The Cheltenham Improvement Act, 1852, with respect to the qualification and disqualification of Commissioners (ss. 14, 15), incorporate the 15th section of the Commissioners Clauses Act, 1847, which imposes a penalty of 50*l.* upon every person who shall act as a Commissioner without

(a) It was also objected that notice of action was necessary under the 138th and 139th sections of The Public Health Act, 1848, (incorporated with The Cheltenham Improvement Act, 1852), and a rule nisi was granted on this point also, but it was abandoned on the argument.

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being duly qualified, and enables *any person* to sue for such penalty. The right to recover the penalty depends on that enactment, which is general in its terms and does not require the consent of the Attorney General to enable the party to sue. It is said, however, that this enactment is qualified by the 133rd section of The Public Health Act, 1848, which is also incorporated with The Cheltenham Improvement Act, 1852. But the incorporating section of the latter Act (sect. 127) is headed, "and with respect to the recovery of damages and *penalties not specially provided for.*" This is a penalty specially provided for, since provision is made for the offence of acting as a Commissioner without qualification, by subjecting the person so acting to the penalty imposed by the 15th section of The Commissioners Clauses Act, 1847.—Secondly, assuming that the 15th section of The Commissioners Clauses Act, 1847, is qualified by the 133rd section of The Public Health Act, 1848, the plaintiff is entitled to sue for the penalty without the consent of the Attorney General, because he is a "party grieved" within the meaning of that enactment. It appears on the face of the declaration that the plaintiff, who was qualified to act as a Commissioner, would have been elected if the defendant had not been a candidate. [*Bramwell, B.*—The penalty is not for being a candidate but for acting as a Commissioner.] The defendant could not have acted unless he had been elected, and the plaintiff is grieved by his election.—Thirdly, the application to stay the proceedings was made too late. It is an appeal to the equitable jurisdiction of the Court; there is no instance in which such an application has been made after trial. The objection should have been raised by plea. The defendant has no right to take his chance of a verdict and, failing before a jury, afterwards come to the Court and ask for its interference. At latest the motion

should have been made within the first four days of the term after the trial took place. [*Bramwell*, B.—The defendant is too late if by delay he can waive this objection.] The defence is analogous to the want of notice of action and should therefore have been pleaded. The Court will not give a defendant the advantage of the Statute of Limitations unless he plead it; 2 Saund. 68. The 12 & 13 Vict. c. 106, s. 153, enacts, that the assignees of a bankrupt, with the leave of the Court of Bankruptcy *but not otherwise*, may commence or defend any action which the bankrupt might have commenced or defended. In *Lee v. Sangster* (a), which was an action commenced by the plaintiffs, assignees of a bankrupt, without such leave, the Court of Common Pleas refused to stay the proceedings, and *Williams*, J., in delivering the judgment of the Court, says “It was contended that the right of the assignees to sue, being a thing created by the Act alone, must be taken with the qualification annexed to it by the Act, viz., that they shall not have the right to sue unless they shall have obtained the leave of the Court of Bankruptcy. But this argument would prove too much, for it would shew that the fact of no such leave having been obtained, would furnish a good plea to the action, and consequently that the present rule was misconceived.” [*Bramwell*, B.—If consent were given after plea, would that not be sufficient?] It may be doubtful whether a subsequent ratification would be sufficient, as the rights of third parties would be affected.

Arguments for the defendant.—First, the consent of the Attorney General is a condition precedent to the right to sue. The penalty is sought to be recovered under the 133rd section of the Public Health Act, 1848. The plaintiff does not declare in debt for the penalty of 50*l*.

(a) 2 C. B. N. S. 1.

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imposed by the 15th section of The Commissioners Clauses Act, 1847, but he sues as well for the Cheltenham Improvement Commissioners as for himself; and the declaration is framed on the supposition that he is a "party grieved:" *Boyce v. Higgins (a)*.—Secondly, the plaintiff is not a party grieved. As a ratepayer, he is no more grieved by the defendant acting as a Commissioner than the other ratepayers. Neither is he grieved as a candidate, for it by no means follows that he would have been elected a Commissioner if the defendant had not been a candidate.—Thirdly, the application to stay the proceedings is not too late.

Cur. adv. vult.

The judgment of the Court was now delivered by

WATSON, B.—This was a *qui tam* action, brought to recover a penalty of 50*l.* from the defendant as a Commissioner of "The Cheltenham Improvement Act," for acting as such Commissioner without a qualification.

In the declaration, the plaintiff sued as well for the Cheltenham Commissioners as for himself; and stated that he and the defendant and others were candidates at an election of a Commissioner, at which the defendant had a majority of votes, and was elected and acted as such Commissioner. The plaintiff alleged that he was a party grieved, as a ratepayer of the borough, also as a candidate. The defendant pleaded *nil debet*. The cause was tried before *Willes, J.*, at the Gloucestershire Spring Assizes, 1857, when a verdict passed for the plaintiff with liberty to move to enter a verdict for the defendant.

A motion was accordingly made in the ensuing term, and a rule granted to enter a verdict for the defendant on two

(a) 14 C. B. 1.

grounds: first, that the plaintiff was not a party aggrieved within the above Act; and secondly, that the plaintiff ought to prove that he had the consent of the Attorney General, in writing, to bring the action. The rule was in the alternative to arrest the judgment.

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This rule was argued in last Trinity term, by the *Solicitor General* and Mr. *Prentice*, on the part of the plaintiff, and Mr. *Powell* for the defendant. During that discussion a question arose how far the obligation as to the want of the consent of the Attorney General could be raised on this rule, and whether the proper course was not to move to stay proceedings. Accordingly Mr. *Powell*, on the 12th day of June, in last Trinity term, moved to stay proceedings, on affidavits stating that the consent of the Attorney General had not been obtained, against which cause was shewn in this term on three grounds.—First, that the consent of the Attorney General was not necessary by the provisions of the local Act —Secondly, that plaintiff was a party grieved.—Thirdly, that the motion was too late after trial.

The questions on both rules turn on the provisions of The Cheltenham Improvement Act. The facts were, that the defendant was one of four candidates, for the office of Commissioner under that Act; and that he was elected, and acted as such, without a qualification.

The local Act incorporates the 15th section of "The Commissioners Clauses Act, 1857" (10 & 11 Vict. c. 16), by which section it is enacted, that every person who acts as a Commissioner without a qualification "shall for every such offence be liable to a penalty of 50*l.*; and such penalty may be recovered by any person with full costs of suit in any of the superior Courts." Again, by the local Act, it is provided "with respect to the recovering of damages, and of penalties not specially provided for, and

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to the determination of any matter referred to justices of the peace, that certain sections of "The Public Health Act, 1848," (11 & 12 Vict. c. 63,) should be incorporated, and amongst others section 129, whereby any penalty, not otherwise provided for, may be recovered before justices of the peace; and also the 133rd section of The Public Health Act is incorporated, which provides, "that no proceeding for recovery of any penalty incurred under the provisions of this Act shall be had or taken by any person other than by a party grieved, or the Local Board of Health in whose district the offence is committed, or by the churchwardens and overseers of the poor (where any such penalty is directed to be paid to the churchwardens and overseers of the poor), without the consent in writing of her Majesty's Attorney General first had and obtained:" "and if the application be not otherwise provided for, one-half thereof shall go to the informer and the remainder to the local Board of the district in which the offence was committed."

It was contended that this latter clause did not require the action to be brought by the party grieved, or by the consent of the Attorney General, as the recovery of the penalty in question was specially provided for, inasmuch as the section referred to (Commissioners Clauses Act, 1847, sect. 15), provides, "the penalty may be recovered by any person in a Superior Court." This point is very doubtful; but it is not necessary to decide it, for, as to that part of the rule by which the defendant seeks to enter a verdict for him, it is clear it cannot be made absolute unless the plaintiff failed to prove some allegation in his declaration. But he did not; he proved all he alleged as matter of fact. For, though he said he was a party grieved, yet he did not say so as a mere fact, but as a consequence from previous facts, that is, he states the facts and then says, "I think I

am a party grieved." This being so, the rule to enter the verdict must be discharged. But this raises further questions. First, do the facts shew he is a party grieved, as he contends? In our judgment clearly not. He is in no way grieved by the defendant acting as a Commissioner, (see *Boyce v. Higgins (a)*.) Then, is the declaration good on any other ground? Now, the declaration here is in a *qui tam* action. The plaintiff does not ask for the entire penalty, and therefore, whether the 10 & 11 Vict. c. 16, s. 15, is or is not qualified by the 11 & 12 Vict. c. 63, it does not authorize this declaration, which indeed is not founded on it. Then, can the declaration be held good under the 11 & 12 Vict. c. 63, s. 133? That depends (as the plaintiff was not a party grieved) upon whether or no it was necessary not only to have, but to allege, the consent of the Attorney General. We think it is necessary such consent should be alleged. It is really the title to sue; without it the informer has no right of action. If so, the declaration is bad. We are of that opinion, and we make the rule absolute to arrest the judgment.

As to the rule to stay the proceedings, although we think the objection is one that may be taken by plea or demurrer, we think it may also be taken by a motion to stay proceedings.

With respect to the plaintiff's objection that the motion here is too late, it is enough in the present case to say, that, looking at the ambiguous way in which his declaration is framed, endeavouring to make a case on the ground that he was a party grieved, we think he cannot complain of a delay by the defendant, into which the plaintiff has led him. We therefore make this rule absolute also.

Judgment accordingly.

(a) 14 C. B. 1.

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Jan. 30.

ROBSON v. CRAWLEY and COOKE.

In an action by the drawer against A. and B., acceptors of a bill of exchange, A. pleaded that the bill was accepted by B. without his knowledge and in fraud of A., with the knowledge of the plaintiff. The plaintiff sought to exhibit interrogatories to A. as to whether there had ever been a partnership between him and B., and if so, as to the business and the particular terms of the partnership. The application was supported by the common affidavits only.—*Held*, that such questions were too large.

Semble, that the inquiry should have been limited to a specific time and place, or to the specific facts from which a partnership might be inferred.

DAY had obtained a rule calling on the defendant Crawley to shew cause why the plaintiff should not be at liberty to exhibit interrogatories to him, pursuant to the Common Law Procedure Act, 1854.

The action was brought by the plaintiff as drawer, against the defendants as acceptors of a bill of exchange. The defendant Crawley pleaded (*inter alia*) that the bill was accepted by the defendant Cooke without the knowledge and in fraud of the defendant Crawley, and beyond the scope of the defendant Cooke's authority, with the knowledge of the plaintiff.—Issue thereon.

The interrogatories sought to be administered were as follows:—

1. Were you ever, and if yea, when, and during what time, a partner with the defendant John Cooke, in any, and what business; and under what style or firm?
2. Was it not understood, when you so became a partner, that the monies brought by you into such business, and the capital of the said partnership, would or might be applied wholly or in some part to the liquidation of debts, for which the said John Cooke was then liable?
3. Were not some of such debts so liquidated?
4. Did the said John Cooke at and during any and what time, while in partnership with you, carry on, or was he in any way interested in any business in South Shields?

Thirteen other interrogatories followed, most of them similar in character to the above.

The application was supported by the ordinary affidavit, that the plaintiff had a good cause of action; and that it

was believed that the plaintiff would derive material benefit in the cause from the discovery sought by the interrogatories.

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Beasley now shewed cause.—These are fishing interrogatories. The questions are too general; they do not point to any specific facts. *Moor v. Roberts* (a) shews that the right of a party to exhibit interrogatories exists only where he has a definite case, and the materials for proving it are in his adversary's possession. [*Pollock*, C. B.—The first question is clearly too large.] The others branch out of it

Day, in support of the rule.—The plaintiff is entitled to go into all the facts to shew that, by the course of business, the defendant *Crawley* was liable for goods supplied to *Cooke*. [*Martin*, B.—The plaintiff has no right to ask whether 30 years ago they were in partnership. The interrogatories should be confined to facts at the date of the bill. The question of partnership is a very difficult one; the plaintiff should have asked as to any fact from which a partnership may be inferred.]

POLLOCK, C. B.—I should be sorry to introduce a practice with regard to interrogatories which would have the vice of special demurrers, but we must be cautious not to allow interrogatories, drawn with such a latitude of inquiry as to place and time, upon the supposition that the Court or a Judge would cut them down. If the interrogatories were open to slight objections only, perhaps the Court or a Judge might allow them to be amended; but I protest against the Court or a Judge drawing interroga-

(a) 26 L. J., N. S., C. P. 246.

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stories. If, as a whole, they are not proper, we ought to disallow them.

MARTIN, B., and CHANNELL, B., concurred.

Jan. 18.

ASSOP v. YATES.

Declaration against a master alleging that he knowingly, carelessly and negligently erected a hoarding in a street and left a certain machine in a position in which it was likely to cause danger to the workmen, and that a cart accidentally ran against the hoarding and knocked down the machine against the plaintiff. It appeared that a hoarding had been erected by the defendant, a builder, which projected too far into the street; but sufficient room was left for carts to pass; a heavy machine was placed inside

DECLARATION.—That the defendant was erecting certain buildings in Water Street, and, for that purpose, was using a certain machine called a crab and cradle, and had built up, and continued to keep built up, a certain hoarding abutting on Water Street, which was a public highway: that the plaintiff was employed by the defendant to work on, and was carefully working at and in the said buildings, and at the erection thereof: that the defendant did knowingly, carelessly and negligently place, and cause to be placed, and continue, and cause to be continued, the said machine and hoarding in an unsafe and dangerous position, and unsafely and dangerously near to and upon the said street, along which carts and waggons had a right to pass and were constantly passing and repassing; and, while the plaintiff was so carefully working, and the machine and hoarding being then and there so placed and continued with the personal knowledge, direction and consent of the defendant, and the said danger and unsafeness being then and there known personally to and by the defendant, a certain cart, accidentally and by and through the machine and the hoarding being then and there so unsafely and

the hoarding and close to it. A cart in passing struck against the hoarding and knocked down the machine against the plaintiff, a workman employed by the defendant. The plaintiff had previously made some complaint of the position of the machine to his master, but voluntarily continued to work though the machine was not moved.—*Held*, that there was no evidence to go to the jury of the master's liability.

dangerously placed and continued as aforesaid, ran against and knocked down the said hoarding, and the machine was, by being so dangerously and unsafely placed, cast and thrown upon and against the plaintiff.

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Pleas.—First, that the defendant was not erecting the said buildings, nor did he build up or continue to build up the said hoarding as alleged.—Secondly, Not guilty.

Whereupon issue was joined.

At the trial, before *Watson, B.*, at the last Liverpool Summer Assizes, it appeared that the defendant was a contractor, who had employed the plaintiff as a mason upon a certain house which he was erecting in Water Street, Liverpool. A hoarding had been put up, which was alleged to have projected too far into the street, but it was shewn that sufficient room was left to allow carts to pass. Between the hoarding and the building at which the plaintiff was employed, was a heavy machine, called a crab and cradle, used for lifting stones, so placed that anything which knocked down the hoarding would knock down the crab and cradle. The plaintiff had complained to the defendant of the position of the crab and cradle, and alleged that he could not conveniently pass with mortar between the machine and the wall. A cart which was being driven along the street swung against the hoarding, whereby the crab and cradle were knocked down, and the plaintiff was thrown into the cellar and hurt. Upon these facts the learned Judge directed a nonsuit to be entered.

Brett, in the present Term, had obtained a rule for a new trial, on the ground that the learned Judge was wrong in ruling that there was no evidence to go to the jury.

Hugh Hill and *W. R. Cole* appeared to shew cause (a), but the Court called on

(a) Jan. 16. Before *Pollock, C. B.*, *Martin, B.*, *Watson, B.*, and *Channell, B.*

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Brett, to support the rule.—It should have been left to the jury to say whether the cart accidentally knocked down the hoarding by reason of its being in a dangerous position. [*Martin*, B.—It did not appear that the negligent placing of the hoarding caused it to fall: on the contrary, it was expressly shewn that the cart knocked it down. *Watson*, B.—Is there any authority, that, if A. puts up an erection in a public highway, and B., without negligence, knocks it down upon C., that A. is liable to an action?] In *Lyack v. Nardin* (a) it was said by Lord *Denman*, “If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.” Here, as in that case, the accident was caused by the plaintiff’s negligence in combination with other active causes. *Illidge v. Goodwin* (b) supports Lord *Denman*’s view. The objection, if any, is only available in arrest of judgment, because all the allegations in the declaration were proved.

Cur. adv. vult.

MARTIN, B., said.—We are all of opinion that my brother *Watson*’s ruling was correct, and that this rule must be discharged. The plaintiff was employed in building a house in Water Street, Liverpool. A hoarding had been put up to protect the building from carriages passing in the road. The plaintiff had complained of the hoarding, but it is clear that this complaint really was that the space between the hoarding and the building was too narrow. In this action against his employer, he complained that it was too wide. It was contended that there was a case for

(a) 1 Q. B. 29, 35.

(b) 5 Car. & P. 190.

the jury. We think that there was not. First, because, after having complained of the hoarding, and knowing all the circumstances, he voluntarily continued at work. Secondly because the part which the defendant took in causing the injury is too remote to give a cause of action to the plaintiff. It was said, however, that the declaration was carefully framed, that every allegation in it was proved, and that the objection was only available to the defendant in arrest of judgment. The answer is, that, in every case of this kind, the plaintiff must shew that he is in a condition to recover damages, and he has failed to do that.

Rule discharged.

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WILLIAMS v. EYTON.

*Indy. App. in Ex. Chs
44 L.N. 357
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TRESPASS for breaking and entering certain land of the plaintiff, being part of an allotment numbered 93 under The Flint Inclosure Act.

Plea.—That there was a common and public highway over and through the land in question, and that defendant, having occasion to use the said way, did go, return, pass and repass, on foot and with carts and carriages, &c., on the said land.—Whereupon issue was joined.

By the
General In-
closure Act,
41 Geo. 3,
c. 109, s. 8,
in case the
Commissioner
shall be
empowered
to stop up
any old or
accustomed
road passing
through any
part of the old

inclosures, &c., the same shall in no case be done without the concurrence or order of two justices. The 53 Geo. 3, c. lxi. (The Flint Inclosure Act), by s. 1, appointed a Commissioner to carry the Act into execution, subject to such of the regulations, restrictions and provisions, &c., in the 41 Geo. 3, c. 109, as were not altered, varied, controlled by or repugnant to the provisions of that Act. Sect. 19 enacts, that it shall be lawful for the Commissioner to stop up any old or accustomed public road or roads over the *marshes, commons and waste lands*, subject nevertheless to the concurrence of two justices, and under such regulations as are contained in 41 Geo. 3, c. 109, and provided that the old roads should not be discontinued till the new roads were properly formed. The marshes were allotted in 1819, when a gate, which had since been kept locked, was put up across an old road, but the road had since been used by foot passengers occasionally. The award of the Commissioners, executed in 1830, set out the new roads and directed the old roads to be stopped up. A certificate of two justices, that the new roads had been formed and completed, under the 9th section of 41 Geo. 3, c. 109, was put in and proved; but no order of two justices for stopping the old road was produced.—*Held*, that it might be presumed that an order of two justices for stopping up the old road had been duly made.

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At the trial, before *Cockburn*, C. J., at the last Summer Assizes for the county of Flint, it appeared that before the passing of the Flint Inclosure Act, 53 Geo. 3, c. lxix. (a), there had been a public highway over the land in question, which was a marsh, to a place called Pentre Rock. The award of the Commissioner made in pursuance of that Act was dated the 24th of July, 1830. It contained the following passages:—"I have in the map or plan, hereunto annexed, and which I direct to be taken as part of this my award, set forth and delineated * * * the public and private roads and ways, &c. * * * And I do hereby set out and appoint the several public carriage roads and highways, bridleways, private carriage roads, and footpaths, through and on the said marshes, commons and waste lands * * * and which

(a) Section 1 enacts, that J. C. shall be "Commissioner for dividing, allotting and inclosing the said marshes, commons and waste lands in the township of Flint, and for carrying the several other purposes of this Act and also the (41 Geo. 3, c. 109) into execution; under and subject to such of the regulations, directions, restrictions and provisions contained in the said recited Act as are not altered, varied or controlled by, or repugnant to the powers and provisions of this Act."

Section 19. "It shall and may be lawful to and for the said Commissioner, and he is hereby authorized and empowered, in case he shall think proper, to stop up, turn, or divert any old or accustomed public road or roads, way or ways, path or paths, track or tracks, passing or leading through or over the said marshes, commons and waste lands; subject nevertheless to

the order and concurrence of two justices, and to such provisions, and under such regulations, directions and conditions as are contained in (41 Geo. 3, c. 109,) respecting the stopping up of any old accustomed road or roads; and the several roads, ways, paths and tracks to be stopped, shall be and be deemed to be part of the lands and grounds to be divided, allotted and inclosed by virtue of this Act: Provided always, that none of the present roads, ways, paths or tracks leading through or over the said marshes, commons and waste lands, shall be shut up or discontinued until the several roads and ways intended to be and remain public roads or highways, shall be set out in manner by the said recited Act directed, and until the same shall be properly formed and made safe and convenient for the passage of horses, cattle, and carriages."

I have caused to be made, formed and completed, &c. (Then followed the particulars of the several roads.) And I order and award, that all other public roads, &c., bridleways, private roads, footways, tracks, paths or passages used as such, upon, through or over the said marshes, commons and waste lands, or along or by the sides of or adjoining the same, or any of the allotments thereafter mentioned, shall be discontinued and stopped up, as being in my judgment unnecessary and useless."

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The road in question was not one of those set out in the award. The award did not recite any order of two justices for stopping up the road, and no such order was produced or proved at the trial. It was, however, shewn that a gate had been put up across the road when the allotments were made in 1819, which gate was kept locked; and that various persons had from time to time paid small sums as acknowledgments for passing with carts through the gate. Foot passengers were in the habit of passing on the road. A certificate of two justices, dated February 14th, 1821, was produced, which stated "that the several public carriage roads therein mentioned, which have been set out and made in and upon the commons, &c. (being those mentioned in the award), have been well and sufficiently formed, completed and repaired. And we do direct, that from henceforth, the same several roads shall be supported and kept in repair by such persons and in such manner as the Commissioner for inclosing the said commons and waste lands shall by his award direct, and as the same several roads ought to be maintained and repaired according to law."

Upon these facts the learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him; the Court to be at liberty to draw such inferences from the facts as a jury might draw.

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M^cIntyre, in Michaelmas term, had obtained a rule to shew cause why the verdict should not be set aside on the ground that the public highway mentioned in the plea was still a subsisting highway, notwithstanding the inclosure.

Welsby, Beavan and Coxon now shewed cause.—The 19th section of 53 Geo. 3, c. lxix., enacts, that it shall be lawful for the Commissioners to stop up any old public road across the *marshes*, subject nevertheless to the order and concurrence of two justices and such provisions as are contained in the General Inclosure Act (41 Geo. 3, c. 109). Section 8 of that Act provides, that in case the Commissioners shall “be empowered to stop up any old or accustomed road, passing or leading through any part of the *old inclosures* * * * the same shall in no case be done without the concurrence or order of two justices acting for the division, and not interested in the repair of such roads.” Now, though there was no direct proof that such an order exists, yet it may be presumed that it was made. The general rule is, that everything done is to be taken to have been rightly done. What has been done with reference to this road is entirely consistent with the presumption that the award stopping up the roads was properly made. The new roads set out in the award were declared by two justices in special sessions to be fully and sufficiently formed, completed and repaired. This order was in pursuance of the 9th section of The General Inclosure Act. It is to be presumed that an order for stopping up the old road was obtained before the new road was regularly made. The old road has in fact been stopped up since 1819. There is no provision in either Act pointing out where the order is to be deposited. [*Martin, B.*—The justices making it would probably be justices not residing in the

immediate neighbourhood.] In *Manning v. The Eastern Counties Railway Company* (a), search was made, and the order was not to be found, but the award recited it, and the Court held that an order might be presumed. *Parke*, B., there said, "the award must be taken to have been rightly made, unless there were some inference to the contrary from subsequent enjoyment inconsistent with it. There was, however, no evidence to raise any such inference. Therefore there was sufficient evidence in support of the award, unless the defendants were bound to prove affirmatively that the order of justices was made, and I am satisfied that they were not, and that the circumstance that such an order was required makes no difference in the application of the principle." In *Goodtitle d. Baker v. Milburn* (b), it was held that the Commissioners were not bound to state in their award all the authorities they had, and the presumption was, that they had acted according to their jurisdiction as the contrary did not appear. *Doe d. Nanney v. Gore* (c) and *Doe d. Roberts v. Mostyn* (d) are authorities to the same effect.—They also referred to *Gibson v. Doeg* (e).

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McIntyre and *Morgan Lloyd*, in support of the rule.—If no order of justices was made the highway still exists: *Logan v. Burton* (f), *Harber v. Rand* (g). [*Welsby*.—In the latter case it was affirmatively shewn no order was ever made.] By the 41 Geo. 3, c. 109, s. 8, the order of the justices is to be subject to appeal. It is therefore clear that it must be deposited with the clerk of the peace, and be open to inspection, so as to enable parties to appeal (h).

(a) 12 M. & W. 237. See p. 251.

(b) 2 M. & W. 853.

(c) 2 M. & W. 320.

(d) 12 C. B. 268.

(e) *Antà*, p. 615.

(f) 5 B. & C. 513.

(g) 9 Price, 58.

(h) See 55 Geo. 3, c. 68, s. 2, and

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Here the Commissioner does not profess to have acted *with the concurrence* of two justices. In fact an order has been produced which shews that, though the justices did something, they did not make the order, without which the road could not be stopped up. [*Channell, B.*—There is no reason to suppose that there were not separate orders.] The user has not been pursuant to the award; therefore it does not create a presumption in favour of the award: *Rex v. Haslingfield (a)*. By the award the way is stopped for all purposes; but the way has since been used as a footway. Slight evidence is sufficient to rebut a presumption. [*Pollock, C. B.*—The value of a presumption may be greater or less; it cannot be said because there is some evidence the other way that there is no presumption.] The order of justices is not recited in the award, and therefore its existence will not be inferred. There is nothing to shew that the justices could have made the order after the award was completed.—They referred also to *Heysham v. Forster (b)*.

WATSON, B.—I am of opinion that this rule must be discharged. The Lord Chief Baron and my brother *Martin* desired me to say that they entirely concurred. The question at the trial was whether an ancient public highway, through certain land of the plaintiff, had been stopped up. It was proved that the highway led up to a gateway, and through it into and across a marsh; that an award was made by the Commissioner, under an Inclosure Act, for stopping up the road, and that a gate was then put up, and a stile by the side of the gate. A certificate that the new roads had been completed, duly

5 & 6 Wm. 4, c. 50, s. 85. *De* (a) 2 M. & S. 558.
Ponthieu v. Pennyfeather, 5 Taunt. (b) 5 M. & R. 277.
 634.

signed by two justices, was put in; the completion of such roads being necessary to put an end to the old right of way. The award was executed in 1830. It was contended that, though the Commissioners had power to stop up the old way, it was not proved that it was effectually stopped, because the concurrence of two justices was required, and no order signed by them was produced or proved to have existed. The learned Judge directed a verdict for the plaintiff, giving leave to the defendant to move to enter a verdict for him. The first point, therefore, is, what is the effect of the Act? Does it require the concurrence of two justices to make the award effectual? Upon that I express no opinion. I assume that such concurrence is required. The time during which the evidence shews that the way has been stopped up, viz., since the year 1821, must be taken into consideration, and the question then is, whether, in the absence of proof that no order of justices was made, there is not evidence to warrant the conclusion that an order existed. For myself, I presume, and perfectly believe, that an order was in fact made. The Act does not say where the order is to be deposited. After so long a period, the presumption *omnia rite esse acta* arises. In matter of private right, after so long a period, all presumptions of this sort are made,—thus the inrolment of a deed may be presumed; where there has been a conveyance by lease and release, the existence of the lease may be presumed on the production of the release. So livery of seisin, the surrender of a copyhold estate, or a reconveyance from the mortgagee to the mortgagor, may be presumed. As regards public rights, in *Rex v. Montague* (a) it was held that, in favour of the long enjoyment of a road stopping up a certain creek, it might be presumed that, if

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(a) 4 B. & C. 598.

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a right of public navigation ever existed, it was determined by an act of parliament, a writ of *ad quod damnum*, by commissioners of rivers, or by natural causes. I do not go so far as to say that an act of parliament might be presumed. But, the use of the road having been stopped under the circumstances stated in this case, I think there is evidence from which a jury might presume that every thing was done necessary to stop it effectually, and that a verdict would be wrong if, on the evidence, it was not in favour of the plaintiff. Here the Court is in the position of a jury.

CHANNELL, B.—I also think this rule must be discharged. The learned Judge assumed it to be clear that, at one time, the public highway existed across the plaintiff's land, and he reserved the point for our consideration whether it could be presumed to have been extinguished: in other words, referring to us the question of the validity of the award and the evidence tending to support it. No case has been cited which is exactly in point. It is said that we cannot presume that the award is valid, for two reasons. First, it does not recite the order of two justices. In one of the cases cited there was such a recital. It may be said, if the award had contained a recital, credit must have been given to it, because it could not be supposed that the recital was false; but that puts the case on too narrow a ground. Here such a recital was not necessary, and it is not found; but the presumption is, that what the Commissioner did he did lawfully. We have a right to assume that he had the authority which he purports to have executed. Then it was said that the user was not such as to lead to the presumption that the way was stopped. A gate was put up, and the way ceased to be apparent to the eye. Though the owner may have allowed carts to

pass occasionally, that is not sufficient to prevent the acquiescence of the public from being sufficient to support the award. I think the award must be taken to have been valid, unless there was such a dealing with the property as to be quite inconsistent with it.

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Rule discharged.

BOWES v. FOSTER.

Jan. 29.

TROVER.—Pleas: Not guilty, and not possessed.—Issues thereon.

At the trial before the Assessor of the Court of Passage at Liverpool, the facts, according to the plaintiff's evidence, were, that in June last, being in difficulties, he was desirous of disposing of his stock in trade and business of a chemist; but fearing that some of his creditors would issue execution against his goods, he agreed with the defendant, who was also a chemist, and a creditor of the plaintiff for 40*l.*, that there should be a pretended sale of them to him. For this purpose an invoice of the goods was made out to the defendant, and a receipt was given to him by the plaintiff for the sum of 40*l.*, which was therein stated to be the purchase money of the goods. The plaintiff then delivered possession to the defendant and left the neighbourhood, and an assistant of the defendant took charge of the shop and carried on the business. The defendant afterwards sent the goods to an auctioneer for sale, and the plaintiff, having heard of it, gave notice to the auctioneer that they were his property. The goods were sold, and the plaintiff brought an action

The plaintiff, being in difficulties and fearing that some of his creditors would issue execution against his goods, agreed with the defendant, who was also a creditor, that there should be a pretended sale of them to him. For this purpose an invoice was made out and a receipt given to the defendant for a sum therein stated to be the purchase money, and possession of the goods was delivered to the defendant. Afterwards the defendant sold the goods as his own, whereupon the plaintiff brought trover.—*Held,*

that no property in the goods passed to the defendant; and that the plaintiff was not precluded from shewing that no payment was in fact made and that the transaction was not a real, but a pretended sale.

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against the auctioneer, who obtained an interpleader order, under which he paid the proceeds into Court, and the defendant was admitted to defend the action. At the conclusion of the plaintiff's case, it was submitted by the defendant's counsel that he ought to be nonsuited, inasmuch as it was not competent for him to allege that the agreement under which he had given the invoice and receipt, and had delivered possession of the goods, was intended as between him and the defendant as a fraud on other creditors. The Assessor overruled the objection, and the defendant's counsel then adduced evidence to prove that the goods were delivered to the defendant in satisfaction of the 40*l.* which the plaintiff owed him. The Assessor left it to the jury to say whether the transaction was a *bonâ fide* sale, or a mere colourable one for the purpose of protecting the goods against any creditor who might issue execution: that in the former case they should find for the defendant, and in the latter for the plaintiff. The jury found a verdict for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit.

Brett, in the present term, obtained a rule nisi accordingly, against which

H. James shewed cause.—The plaintiff was not precluded from shewing the real nature of the transaction between him and the defendant. The question is what were the rights of the parties *inter se*? The effect of the transaction as regards third parties is immaterial. It is said that the sale was fraudulent within the 13 Eliz. c. 5, s. 2, and therefore the plaintiff was estopped. But under that statute fraudulent gifts are only void as against purchasers and creditors: *Hawes v. Leader* (a). An assignment of goods in fraud of creditors is valid as between parties to the deed, and as between either party and a stranger: *Bessey v. Windham* (b).

(a) Cro. Jac. 270.

(b) 6 Q. B. 166.

[*Watson*, B., referred to *White v. Morris* (a).] The jury have found that there was no sale, but only a pretended one, in order to protect the goods against creditors in general; consequently no property in the goods passed to the defendant.—The Court then called on

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Brett, to support the rule.—There was no question for the jury, and the plaintiff ought to have been nonsuited. Possession of the goods having been delivered under the invoice, the plaintiff is estopped from saying that there was no sale, and that the transaction was a mere fraudulent pretence for the purpose of deceiving creditors. In *Sims v. Tuffe* (b), a tenant who had paid all his rent, and got his landlord's receipt for it, fearing that his goods would be taken on legal process, agreed with his landlord to destroy the receipt, and that the latter should put in a distress for rent, to protect the goods. The landlord did so, sold the goods and kept the proceeds. The tenant having brought trover for the goods, *Parke*, B., who tried the cause, said, "The parties are in *pari delicto*. I cannot assist the plaintiff in the recovery of the proceeds of this sale. They were both contemplating a fraud. The transaction must be taken as valid between these parties." [*Watson*, B.—There the plaintiff had authorized the sale of the goods, and he could not afterwards maintain trover for them. *Channell*, B.—That case proceeded on the ground of leave and licence. It was conceded that the plaintiff might recover in respect of such of the articles sold as were not included in the inventory.] In *De Metton v. De Mellon* (c), a Frenchman, domiciled at Lisbon, consigned a cargo which was his property to Nantes, under the name of a native Portuguese who acted as "neutralizer." The ship being taken and

(a) 11 C. B. 1015.

(b) 6 C. & P. 207.

(c) 2 Camp. 420.

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brought into an English port, the cargo was libelled in the Court of Admiralty. The Portuguese, with the privity of the Frenchman, claimed it; and it was ordered to be delivered up to him as neutral property. Lord *Ellenborough* ruled that an action for money had and received could not be maintained to recover the proceeds of the cargo, and that ruling was afterwards affirmed by the Court (a). The ground of that decision was, that the owner of goods who colludes with another in procuring the adjudication of a Court that the goods are the property of the latter, is estopped by his own act from afterwards claiming them as his own. [*Martin*, B.—In that case there was an absolute transfer of the property to the neutralizer: it was a case of trustee and cestui que trust. *Channell*, B.—There was a decision *in rem* of a Court having jurisdiction over the subject-matter. The Court adjudged that the property belonged to a certain person and that it be restored to him: that was an answer to an action against him for money had and received, to recover the proceeds.] In *Alner v. George* (b), Lord *Ellenborough* ruled that if, in an action for goods sold, the defendant proves a receipt in full signed by the plaintiff, evidence is not admissible in answer that the plaintiff has assigned all his effects for the benefit of his creditors: that the action was brought by his trustees in his name: that no money passed when the receipt was given, and that the plaintiff and defendant colluded together to defeat the action. Lord *Ellenborough* there said,—“There can be no doubt that a receipt in full, where the person who gave it was under no misapprehension and can complain of no fraud or imposition, is binding upon him.” [*Martin*, B.—Notwithstanding a receipt, it may be shewn that no money passed. That is the distinction between a receipt

(a) 12 East, 234.

(b) 1 Camp. 392.

and a release.] In *Montefiori v. Montefiori* (a), where a person in order to represent another, who was engaged in a marriage treaty, as a man of fortune, gave him a note for a large sum of money, as the balance of accounts between them, whereas no such balance existed, the note was held good as against the maker. Lord *Mansfield*, C. J., there said,—“No man shall set up his own iniquity as a defence, any more than a cause of action.” *Robinson v. M'Donnel* (b) shews that, though a transaction of this kind may be void under the 13 Eliz. c. 5, it is nevertheless binding on the parties. In *Doe d. Roberts v. Roberts* (c) an estate was conveyed for the purpose of giving a colourable qualification to kill game; and it was held that, as against the parties to it, the conveyance was valid and sufficient to support an ejectment. The principle of that decision is equally applicable to a parol transfer of property, viz., that no man can be allowed to set up his own fraud to defeat his act.—He also referred to *Jones v. Yates* (d).

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POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. A large portion of the argument in support of it appears to me to arise from not distinguishing between a fact and the evidence of a fact. Where goods are professed to be transferred by deed, the deed actually transfers the property; and, the moment the deed is executed, by law the property ceases to be the property of the person who has executed the deed, and becomes the property of the person in whose favour it has been executed. That is not so with a fictitious invoice, or a receipt for money which has never been paid. The documents, no doubt, are evidence of a fact, but the question is whether they may not be rebutted by evidence that there was no sale and no payment. I

(a) 1 W. Black. 363.

(c) 2 B. & Ald. 367.

(b) 2 B. & Ald. 134.

(d) 9 B. & C. 532.

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consider that so much of the argument for the defendant as is founded on any supposed analogy to deeds, altogether fails. Then is there any established rule of evidence or practice in the administration of justice, that, where parol documents are produced leading to one result, it is not competent to contradict them and shew that the real truth is not that which the documents import? I think that there is no such rule. With respect to a receipt not under seal, there is no doubt that evidence is admissible to contradict it, and shew that no money passed. In the course of the argument, Mr. *Brett* suggested the case of a person who gives a receipt to another, to enable him to shew that no claim can be made upon him by the person giving the receipt, and in that way obtains money. Such a receipt would no doubt have all the effect it was intended to have: as between the person to whom it was given and the person to whom it was shewn it would be conclusive evidence of payment though no money was paid; but as between the former and the person giving the receipt, it might be shewn that no money passed. What fell from Lord *Ellenborough* in the case of *Alner v. George (a)*, viz., that a receipt in full, where the person who gave it was under no misapprehension and can complain of no fraud or imposition is binding upon him," means, where the receipt in full is given *as and for a real receipt* and discharge. I can well understand that there may be cases where the transaction is of such a fraudulent character that a Court of justice will not inquire about it; for instance, if two persons have committed a robbery and proceed to divide the stolen goods, neither a Court of law or equity would interfere or recognise any agreement as to what share each was to have in such a transaction. And I can well understand that there may be cases falling short of felony where a similar

(a) 1 Camp. 392.

doctrine would hold, on the ground that the Court will not entertain a transaction which makes it necessary for them to recognise a crime. It may be, that the entire doctrine which Mr. *Brett* contends for would be applicable where it is necessary for a Court of law to tolerate, and as it were encourage, a matter which in itself constitutes a criminal offence. But I am by no means prepared to carry that doctrine to every possible transaction where imposition is practised by the parties. In the present case, it appears to me that if the doctrine be applicable the evidence ought not to have been received; but, being received, the question which the jury have to decide is what is the truth. There is no rule, that if evidence is before the jury they are bound to believe one part and pay no attention to another part; on the contrary if the evidence is before them, the truth, whatever it is, ought to prevail. There may even be such a distinction as this,—that if improper evidence is objected to it is not receivable, but, if not objected to and received, the jury are to ascertain the truth and the Court to act on their verdict. Here the evidence was received (it not being objected to), and the jury believed one part in preference to another; and I think that we are doing the best justice by discharging this rule. I remember a case before Lord *Ellenborough*, where a similar objection was taken, and the counsel said, “the parties are in *pari delicto*.” Lord *Ellenborough* replied that it was not a case of *par delictum*; and I am by no means sure that a man who, under the pressure of distress and misfortune, lends himself to such a transaction, is in the same *delictum* as a man who does so without such motive. However, either according to the distinction which I have pointed out between a crime which amounts to felony and such a transaction as the present; or upon the ground that the evidence having been

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received, the Court must deal with it; it appears to me that the rule ought to be discharged.

MARTIN, B.—I am of the same opinion. The plaintiff sues in trover: it appears that he was in difficulties and anxious to prevent his goods being taken in execution. He thereupon proposed to the defendant to take possession of the goods; and, for the purpose of creating a colourable title in him, wrote an invoice as if it were a real sale, and gave a receipt as for the price of the goods. Then, did any property really pass by such a transaction? It is clear that none passed, because there was no real sale but only the appearance of a sale. It is said that the case is the same as that of a transfer by deed, but it is nothing of the kind; because on the execution of a deed the property in the goods passes by force of the deed itself. If Mr. Brett's view be correct, the evidence could not have been objected to, because the objection would not arise until after the invoice and receipt were put in, and then all the previous evidence ought to have been struck out of the Judge's notes. The evidence in substance being given, the Judge was bound to deal with it, and he left it to the jury to say whether the transaction amounted to an absolute sale, or was a mere scheme for the purpose of protecting the goods against creditors, without any intention of transferring the property in them to the defendant. If there was no such intention, there was nothing to divest the plaintiff of it. It is said that a person ought not to be allowed to set up his own fraud. But here there was no fraud: it was only intended to give the defendant the power to pretend that he was the owner of the goods. There is no authority that such a transaction divests the owner of his property in the goods and vests it in a person

to whom there has been no transfer by deed. Several cases have been cited, and if any one of them was in point we ought to pay deference to it, but none of them seem to me to have the slightest bearing on this case except that of *Alner v. George* (a). The case of *Sims v. Tuff's* (b) has been already explained: in reality there was a defence under leave and licence, and what *Parke*, B., said about fraud was not material. With respect to the case of *De Metton v. De Mellon* (c), if there was any relation it was that of trustee and cestui que trust; and it is clear that a cestui que trust cannot maintain an action at law against his trustee. However, in *Alner v. George*, Lord *Ellenborough* said that a receipt in full was an estoppel; and if that be so there would be an estoppel here. But I apprehend that case is not law. The distinction between a receipt and a release has been long established. The fact of a release must be pleaded and put on the record: a receipt cannot be pleaded in answer to the action, it is only evidence on a plea of payment; and where a defendant is obliged to prove payment, a document not under seal is no bar as against the fact that no payment has been made; for how can a jury find that payment was made when it is proved that none was ever made? But, in point of fact, that case is directly overruled by *Graves v. Key* (d), where Lord *Tenterden*, in delivering the judgment of the Court, said: "It is not necessary for us to say what the effect of these indorsed memoranda of receipts would be, supposing that it were incompetent for the plaintiff to contradict or explain them by parol evidence, because it seems to us that the plaintiff may by law give such contradiction or explanation, and that in this case the parol evidence does satisfactorily explain the last memoranda

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(a) 1 Camp. 392.

(c) 2 Camp. 420.

(b) 6 C. & P. 297.

(d) 3 B. & Adol. 313.

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made on each security, and shews distinctly that the balance was not paid." Lord *Tenterden* goes on to say "a receipt is an *admission* only, and the general rule is, that an admission, though *evidence* against the person who made it and those claiming under him, is not *conclusive* evidence, except as to the person who may have been induced by it to alter his condition." Therefore there is a distinct statement of the Court of King's Bench that *Alster v. George* is not law. The distinction between a receipt and a release is this—a release annihilates the debt, but a receipt is only *evidence* of payment; and if it be proved that in point of fact no payment was made, it cannot operate against such proof. Lord *Tenterden* said that a receipt is not *conclusive* evidence "except as to the person who may have been induced by it to alter his condition." Now if, in this case, the defendant had been induced to alter his condition on the faith of the invoice and receipt, the case would have come within that principle; because if a person hands to another a document, which on the face of it professes to be a transfer of property, and that other person is thereby induced to alter his condition, it would be a fraud to take his property from him. *Montefiori v. Montefiori* (a) is a case of that kind. There a man being about to marry, another (for the purpose, I presume, of persuading the woman he was about to marry that he was a person of property) gave him a promissory note for a large sum of money as the balance of accounts between them, which balance he acknowledged to have in his hands, when in fact there was no such balance. After the marriage the maker claimed the note back as given without consideration: but he was considered not entitled to it. The case of *Doe d. Roberts v. Roberts* (b) has been answered by my brother *Watson*. There the transfer was made for the purpose of

(a) 1 W. Black. 363.

(b) 2 B. & Ald. 367.

effecting an object, viz., to give the transferee a qualification to kill game; and he was guilty of a breach of honour and not of legal obligation in not reconveying the land. With respect to the other cases, it is perfectly true that if an act be done the party cannot undo it by reason of his own fraud; but here the act was not done, for the jury have expressly found that there was no sale at all, but merely a colourable one. I am of opinion that if the Judge had rejected the evidence he would have done wrong, and we must have set aside the verdict; and the evidence being admitted he was bound to take the opinion of the jury upon it. For these reasons, I am of opinion that the rule ought to be discharged.

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WATSON, B.—I am of the same opinion. It is clear that goods may be transferred either by indenture or delivery; and if either the one mode or the other had been established in this case, it would have been incompetent to set up as an answer that it was done for fraud on third persons. Acts done may be valid as between the parties though void as against third parties. An assignment by deed for the purpose of defeating or delaying creditors is void as against them by the 13 Eliz. c. 5, but it is perfectly good as between the parties. So, where a person conveys land to another for the purpose of qualifying him to kill game, the property passes; and it is not competent to set up that the conveyance was merely to give a qualification. Again, the case of *Philpotts v. Philpotts* (a) decided that where an annuity is granted to a person for the mere purpose of qualifying him to vote for members of parliament the property passes, and the real nature of the transaction cannot be set up to defeat the conveyance. If it were so, no property would be secure, for instead of a deed being evidence

(a) 10 C. B. 85.

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of title, it would be competent to shew that no property passed by force of the deed. In *Philpotts v. Philpotts, Jervis*, C. J., said:—"It is to my mind exceedingly difficult to discover any distinction between this case and that of *Doe d. Roberts v. Roberts*. It may be, that a deed may be bad so far as concerns the law of parliament, and yet, as between the parties, it may not be competent to either to set up its invalidity." There is no law or principle that when a matter is done for the purpose of defeating creditors it is not to be inquired into; and what the jury have here found is not that there was a delivery by way of gift, but that there was no transfer whatever either by parol or deed. Observe the transaction: first, there is an invoice. The invoice may be evidence of a sale, but it does not transfer the property. Then what was the nature of the delivery: was it an absolute delivery for the purpose of transferring the property? Nothing of the kind. The jury have arrived at that conclusion upon consideration of the whole transaction. Suppose a person says, "Take these goods and keep them until I can arrange with a creditor who has issued execution against me:" why cannot he give evidence of the transaction? But the jury must decide what it really was. It is argued that if there is any fraud in the transaction, the parties cannot give evidence of it; but there is no case or dictum for such a proposition. The whole transaction must be looked to in order to ascertain whether there was a transfer in fact—a delivery or conveyance by deed. None of the cases cited apply: my brother *Martin* has gone through them, and in my judgment has answered all of them. It is quite clear that the Judge would have been wrong if he had not received the evidence and left the case to the jury.

CHANNELL, B.—I agree that the rule ought to be dis-

charged. Supposing Mr. *Brett* is substantially right in his argument, it is immaterial, in my view of the case, to determine whether his proper course at the trial was to object to the reception of the evidence, or, when received, to apply to the Judge to strike it out of his notes. On that point I offer no opinion. This is an application to enter a nonsuit pursuant to leave reserved, and must be understood with reference to the finding of the jury—at least with reference to so much as the Court can give effect to; and I am of opinion that the Court is bound to give effect to so much of that finding as shews that there was no intention to transfer the property to the defendant. Then how stands the case on the facts, which are undisputed? If the defendant converted goods which were unquestionably at one time the property of the plaintiff, he would clearly be entitled to the verdict on the plea of “not guilty.” Then how is it with respect to the issue on “not possessed”? The goods were originally the plaintiff’s property, and the defendant, in order to succeed on that issue, must shew that they were so transferred to himself as to vest the property in him. That is not so here. In order to divest the property from the plaintiff, it was necessary for the defendant to shew either a transfer by gift or by sale. A mere delivery of the goods would not prevent the person delivering them from explaining in what sense that took place, so as to shew that there was no intention of vesting the property. The invoice, receipt, and delivery of possession were only *evidence* of a sale, though no doubt they were matters from which a sale might be inferred, and which, unexplained, would call upon the jury to find a sale. Then it is said that when a party is setting up, not an act done and complete as in the case of a deed, but evidence of a fact, a part of the transaction only can be looked at and not

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the whole, and that all that part must be excluded which shews that the parties may have been guilty of fraud. In my opinion that is not a correct view. The cases are quite distinguishable. *Sims v. Tiffs* (a) was an action of trover for the conversion of the plaintiff's goods. The only conversion was a sale of the goods, and the plaintiff had been a party to an arrangement by which the goods were sold; therefore there was a complete defence on the ground of leave and licence, and I think that the learned Judge must have intended to decide it on that ground, because he said that if the defendant had sold any goods which were not included in the inventory under the distress, in respect of those goods the plaintiff was entitled to recover. *De Metton v. De Mellon* (b) is also distinguishable: it may be on the ground stated by my brother *Martin*, that the facts shewed the relation of trustee and cestui que trust, and consequently no action for money had and received would lie. It may also be distinguished on the ground that the rights of third persons had intervened and those rights were adjudicated on. If the cargo in reality belonged to the Portuguese the seizure of it by the British cruiser was altogether wrong; if it was not his property the seizure was right, and the Court of Admiralty would have ordered the cargo to be delivered up to the cruiser. The Frenchman contrived that the Portuguese should represent the cargo as belonging to the latter, and by means of that fraud the Court of Admiralty decided against the right of the cruiser. Therefore the rights of third persons intervening they were expressly adjudicated on. I have some difficulty in reconciling the conclusion at which I have arrived with the language imputed to Lord *Ellenborough* in *Ather v. George* (c). That decision may perhaps be supported on

(a) 6 C. & P. 207.

(b) 2 Camp. 420.

(c) 1 Camp. 392.

the ground suggested by the Lord Chief Baron, or it may be that it is overruled by *Graves v. Key (a)*; but, be that as it may, I agree in thinking that this rule ought to be discharged.

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Rule discharged.

(a) 3 B. & Adol. 313.

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THE declaration stated, that by an indenture dated the 25th December 1793, and made between Thomas Ottley and A. in consideration of the rents and covenants on the part and behalf of B., his executors, administrators and assigns, to be paid, done and performed, demised to B., his executors, administrators and assigns, a certain messuage and lands for a term of sixty-three years; with liberty to B., his executors, administrators and assigns, to make any erections or buildings on any part of the premises. B. for himself, his heirs, executors and administrators (not saying assigns), covenanted that he, his heirs, executors, administrators or assigns would pay the rent reserved; and that he, his executors or administrators would repair the messuage and farm, outhouses, barns, stables and all other erections and buildings which should or might be thereafter erected during the term on the demised premises; and the same being so repaired, that B., his executors, administrators and assigns would at the end of the term yield up. The declaration then stated that the interest of B. in the demised premises, by assignment, vested in the defendants; and that the plaintiff became seized of the reversion, subject to the said term. First breach: that the defendants did not repair the messuage, &c., and other buildings which were during the term built on the demised premises. Second breach: that the defendants yielded up to the plaintiff the premises out of repair.—Second plea: to the breaches, on equitable grounds. That while the defendants were possessed of the demised premises, by indenture they demised them to the plaintiff for a term, less by thirty days than their own term: that the plaintiff covenanted to repair and yield up in repair, the defendants finding certain timber and iron work. The plea then alleged that the want of repair complained of by the plaintiff, was caused by his default and was a breach of his covenant; and that the defendants were ready to find timber and iron work: and that they are entitled to recover from the plaintiff the same amount of damages as he sought to recover from them. The plea concluded by offering to set off the damages.—Third plea: as to not repairing and yielding up in repair certain buildings erected on the premises during the term: That the said buildings were not in being at the time of making the indenture, and were built after the commencement of the term, and were then entirely new erections and not built in the place of anything standing on the land at the time of the demise. On demurrer to these pleas:—

Held: First, that the third plea was bad: for as the covenant was not a covenant absolutely to do a new thing, but to do something conditionally, viz., if new buildings were erected on the demised premises to repair them; and, as when built they would be part of the thing demised, the assignee was bound, though not named.

Secondly, that the second plea was not good as an equitable defence; or as a defence at law, in avoidance of circuity of action, inasmuch as the covenants were not co-extensive, and the damages could not be identical.

Quære, whether a plea professedly on equitable grounds can be held good at common law.

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and Adam Ottley of the one part, and John Wheeler of the other part, after reciting that by certain indentures of lease and release therein described, and by virtue of a common recovery suffered in the Court of Common Pleas in pursuance of the said release, the messuage, farm, lands and hereditaments thereafter mentioned stood limited and conveyed to the said Thomas Ottley and his assigns for life, with remainder to Adam Ottley for his life, and with divers remainders over: and that in the said release was contained a proviso that it should and might be lawful for Thomas Ottley and Adam Ottley, and other persons named in the limitations, as and when they should respectively be in the possession of the premises, by indenture to demise, lease, or grant the same, or any part or parts thereof, to any person for any term of years not exceeding 99 years from the respective times of making such leases, subject to certain conditions &c.: It was by the said indentures witnessed that the said Thomas Ottley and Adam Ottley, in consideration of the yearly rents, covenants, &c., on the part and behalf of John Wheeler, his executors, administrators and assigns, to be paid, done and performed, have, and each of them hath (according to their respective estates) demised, leased, set and to farm let, &c., unto the said John Wheeler, his executors, administrators and assigns, all that messuage, tenement and farm, with the lands, hereditaments and appurtenances thereunto belonging, in Eardington, in the county of Salop, with liberty for the said John Wheeler, his executors, administrators and assigns, at any time during the continuance of this demise, to make any erections or buildings as they should think necessary upon any part of the premises hereby demised: habendum, to the said John Wheeler, his executors, administrators or assigns, from the 25th day of March A.D., 1794, for the term of 63 years.

And in the said indenture are contained certain covenants (that is to say): And the said John Wheeler doth hereby for himself, his heirs, executors and administrators, covenant with the said Thomas Ottley, his heirs and assigns, in manner following (that is to say): That the said John Wheeler, his heirs, executors, administrators or assigns, shall and will yearly pay to the said Thomas Ottley and his assigns, during the term of his natural life, and to the person or persons who for the time being shall be entitled to the reversion and freehold of the said premises expectant upon his decease, the yearly rent or sum of 22*L*, on the days and times hereinbefore limited for payment thereof. And also that he, the said John Wheeler, his executors or administrators, shall and will, from time to time, and at all times during the continuance of this demise, at his or their own proper costs and charges, when and as often as occasion shall be or require, well and sufficiently repair, uphold, maintain and keep the said messuage, tenement and farm, with the outhouses, barns, stables, and all other erections and buildings whatsoever which shall or may be hereafter erected, built or made during the said term on the said demised premises, and also all the gates, rails, &c., and the same being so well and sufficiently repaired, upheld, maintained and kept in repair as aforesaid, he, the said John Wheeler, his executors, administrators and assigns, shall and will, at the end or other sooner determination of the said term, peaceably and quietly leave, surrender and yield up unto the person or persons who shall then be entitled to the freehold or inheritance of the said premises. And by the said indenture the premises therein described were demised to the said John Wheeler, his executors, administrators and assigns, for the said term of 63 years, to wit by appointment by virtue of the said recited power.—
Averments: that John Wheeler entered and became pos-

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essed for the said term; and afterwards, and during the said term, all the estate, term and interest granted to the said John Wheeler of, in and to the said demised premises, by assignment thereof then made, came to and legally vested in the defendants, whereupon the defendants then entered into the demised premises, and then became possessed thereof for the then residue of the said term: and afterwards and during the said term the plaintiff became and was seized as of fee of the reversion of and in the said demised premises, subject to the said term, by assignment thereof then made to the plaintiff, and continued so seized up to and at the expiration of the said term: and afterwards and during the said term, and whilst the defendants were possessed and the plaintiff seized as aforesaid, the defendants did not, from time to time, and at all times during the residue of the said term, when and as often as occasion required, well and sufficiently repair, uphold, maintain and keep the said messuage, tenement and farm, with the outhouses and other erections and buildings which were, after the commencement of the said term, erected during the said term on the said demised premises in good repair: but, on the contrary, the plaintiff says that the said demised messuage, tenement and farm were, whilst the defendants were possessed and the plaintiff seized as aforesaid, and during the said term, by and through the acts and defaults of the defendants, out of good, substantial and complete repair; that divers outhouses, buildings, stables, &c., which were, after the commencement of the said term and during the same, erected and built upon the said demised premises by persons for the time being possessed of the same term before the same became vested in the defendants as aforesaid, and by the defendants after they became possessed as aforesaid, and which were then respectively affixed to the

said demised land in such manner that the same then became and henceforth hitherto have continued to be respectively annexed and belonging to the freehold of the said demised premises, and none of which ever was legally removable by the defendants or any other tenant possessed of the said term as a tenant's fixture, including a water corn mill, being part of such erections and buildings to the said messuage, tenement and farm belonging, were, whilst the defendants were possessed and the plaintiff seized as aforesaid, and during the said term, by and through the acts and defaults of the defendants, and not by or through the exercise of any power or authority contained in the said lease or granted thereby, also out of good and substantial and complete repair: that at the end of the term, to wit on the 25th day of March, 1857, on which day the said term expired, the defendants yielded up to the plaintiff the said several premises above mentioned out of good, complete and substantial repair as aforesaid.

Second plea: As to the money claimed in respect of the alleged breaches of covenant, the defendants for defence on equitable grounds, say: That during the term granted by the said lease, and whilst the defendants were possessed of and entitled to the said demised premises thereunder, to wit on the 28th February, 1832, by an indenture then made between the defendants and the plaintiff, the defendants leased the said demised premises to the plaintiff, from the 25th March, 1831, for 26 years, less 30 days; and the plaintiff thereby covenanted with the defendants that he would, at all times during the continuance of the said demise, at his own costs and charges, when occasion should require, well and sufficiently repair, uphold, maintain and keep in good tenable repair, the said messuage or tenement, mill, &c., and outbuildings thereby demised, and all other erections or buildings which should or might be

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thereafter erected, built or set up during the said demise on the said demised premises, and the wheels, machinery and tackle of the said mill, &c. (reasonable use and wear of the wheels, machinery and tackle only excepted), the defendants, at their costs and expence, finding and providing on the said demised premises sufficient rough timber for the repair of the mill and the wheels and machinery thereof, and also sufficient and proper iron work or castings for the repairing and replacing the wheels and machinery of the mill, when and as occasion should require: and the same being so well and sufficiently repaired, upheld, maintained and kept in repair (except as aforesaid), would at the end or sooner determination of the said demise peaceably and quietly leave, surrender and yield up unto the defendants, their executors, administrators or assigns.—Averments: that the plaintiff entered into the said demised premises under the said lease, and was possessed thereof for the whole of the said term to him thereby granted, and that the dilapidations, defects, want of repair, and supposed breaches of covenant as to which this plea is pleaded, were caused by the neglect and default of the plaintiff during the said term so to him thereof granted, and not by the neglect and default of the defendants or either of them; and were dilapidations which the plaintiff under and by virtue of his said covenant was bound to repair, and no part thereof was caused by such use or wear as in the covenant is excepted; and that the defendants were at all necessary times in that behalf ready and willing to find and provide rough timber, iron work and castings according to the said covenant in that behalf, and were in no default in that or in any other respect: that they are entitled to sue the plaintiff for and in respect of the said breaches of covenant in this plea, and to recover from him the same amount of damages as the amount of damages which the plaintiff seeks to recover

and is entitled to recover from the defendants in respect of the supposed breaches of covenant as to which this plea is pleaded: and that the defendants are ready and willing, and hereby offer to set off and allow to the plaintiff the damages which they are entitled to recover against him against the said damages which the plaintiff is entitled to recover against them: and that at the time of the alleged breaches of covenant as to which this plea is pleaded, there was mutual credit between the plaintiff and the defendants.

Third plea: As to not repairing and not yielding up in repair the water corn mill and buildings erected on the said demised premises during the said term.—That the said water corn mill and buildings were not, nor were nor was any or either of them, or any part thereof, in being at the time of making the said indenture, or at the commencement of the said term, and the same, and each and every of them, and every part thereof, were and was first erected and built after making the said demise, and after the commencement of the said term, and were then entirely new erections and buildings, and were not erected or built in the place of any thing standing or being on the said demised land at the time of making the said demise, or at the commencement of the said term, or at any intermediate time.

Demurrer to both pleas, and joinders therein.

Welsby argued in support of the demurrers in last Michaelmas Term (Nov. 18 and 19).—First, as to the second plea. The defence is not founded upon any equitable right arising out of the contract stated in the declaration, but upon a distinct covenant, from which a legal claim arises which may be enforced in a cross action: *Stimson v. Hall* (a).

(a) 1 H. & N. 831.

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As to the third plea.—The defendant covenants for himself, *his heirs, executors and administrators*, that he, *his executors or administrators*, shall repair the messuage, and also the buildings thereafter to be erected on the demised premises. It will be contended that his *assigns*, not being named, are not bound to repair the buildings erected after the commencement of the term. The defendant relies on the distinction taken in *Spencer's Case* (a), where it is said: "If the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is quodammodo annexed appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant; but in the case at bar, the covenant (a covenant to build a brick wall on part of the land demised) concerns a thing which was not in esse at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being." But this covenant extends to the support of the thing demised. It touches and concerns the thing demised, though that particular part of the thing demised to which the covenant relates does not come into existence till after the demise. [*Bramwell*, B.—If a lessee covenants to build, it is *primâ facie* in the contemplation of the parties that he shall build immediately, and the breach may be complete before the assignment.] In *Platt on Covenants*, p. 471, it is said:—"The second resolution in *Spencer's Case* takes a distinction, the good sense of which is not very easily discoverable. It was resolved that if the covenant concerned a thing which was not in esse at the time of the demise made, but to be done on the land afterwards (for instance, to build a new wall on some part of the premises demised), the covenantor, his

(a) 5 Rep. 16 a.

executors and administrators, would be bound, but not the assignee if he were not named; for the law would not annex a covenant to a thing which had no being; but if the lessee had covenanted for himself and his assigns, then, for as much as it was to be done upon the land demised, it should bind the assignee; and the reason given is, that although the covenant did extend to a thing to be newly made, yet it was to be made upon the thing demised and the assignee was to take the benefit of it, and therefore he should be bound by express words:" citing *Grey v. Cuthbertson* (a). It is singular that neither the learned compiler nor the editors of *Smith's Leading Cases* notice the point as to an assignee being thus bound without being named. The cases both before and subsequent to *Spencer's Case* (b) are in conflict with the second resolution in that case. In an *Anonymous Case* in *Moor* (p. 159, pl. 300), in Hilary Term, 26 Eliz., all the Court agree that if lessee for life covenants for himself, his executors and administrators, to build a wall during his term, and afterwards assigns over his estate, the grantee of the reversion may maintain an action of covenant against the assignee. "And *Gawdy* remembered a case which was then lately adjudged in the Common Bench, where lessor for years covenanted in his lease that at the end of the term he would make a new lease to the lessee or his assigns, and afterwards granted over his reversion, and at the end of the term the lessee brought covenant against the grantee." [*Watson*, B.—The case in *Moor* is probably *Spencer's Case*.] In *Smith v. Arnold* (c), "the case was: lessee for life covenanted for himself, his executors and administrators, to build an outhouse on the lands of the lessor, and afterwards the lessee for life assigns his estate to T. S. The question was, whether such assignee

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(a) 2 Chit. 482.

(b) 5 Rep. 16 a.

(c) 3 Salk. 4.

from the buildings, and therefore he ought to bear the burthen, though not named. There is nothing in *Spencer's Case* (a) conflicting with that view. The true distinction is, that if the covenant runs with the land it binds the assignee, whether named or not; but if the covenant is collateral only it does not bind the assignee, unless named. The authorities as to what covenants run with the land are collected in *Smith's Lead. Cas.*, vol. 1, p. 42.

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Atherton (*Field* with him), for the defendants.—First, the second plea discloses a good equitable defence; and it also affords an answer at law, on the principle of avoiding circuity of action. The words “for defence on equitable grounds” do not prevent the subject-matter of the plea from operating as a defence at law, if in fact it could be so pleaded. It is a good plea on equitable grounds, because the breaches of covenant to which it is pleaded result from the plaintiff’s violation of his covenant with the defendant to keep the premises in repair. It is true that the damages are unliquidated, but the two claims are in respect of the same neglect to repair. In *Beasley v. Darcy* (b), the damages which the tenant claimed against his landlord were unliquidated. *Lord Cawdor v. Lewis* (c) was also a case of unliquidated damages. But, at all events, the plea is good at law in avoidance of circuity of action. The general doctrine on this subject was laid down in *Turner v. Davis* (d) where *Kelynge*, C. J., said that “the law abhors circuity of action.” The subsequent authorities are collected in a note to that case in 2 *Wms. Saund.*, p. 150 b. There it is said, “But a cause of action against a plaintiff will be no bar to an action by him for avoiding circuity of action, when the recovery in both actions is not equal; as

(a) 5 Rep. 16 a.

(b) 2 Scho. & Lef. 403, note.

(c) 1 Y. & C. 427.

(d) 2 Saund. 149.

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in waste it is no bar that the plaintiff covenanted to repair, for in waste the plaintiff is entitled to recover *treble* damages, but the defendant in his action of covenant will only recover single: Moor, 23, pl. 80." There, however, the damages must of necessity be unequal, because a statutory provision gave one party treble damages. But where the facts are such that the defendant can recover from the plaintiff as much as the plaintiff can recover from him, there is a good defence in avoidance of circuity of action: *Connop v. Levy* (a). It is said that here the covenants are not identical, and that the defendants' is more onerous than that of the plaintiff; but the plea alleges that the amount of damage is the same. That allegation must be taken to be true, for though the covenants are not co-extensive, the damages may be equal in amount. If the plaintiff's damage is greater, that fact may be new assigned. [*Bramwell*, B., referred to *Charles v. Altin* (b), and *Alston v. Herring* (c).] Those decisions proceeded on the ground that the amount of damage would not necessarily be the same in both actions.

Secondly, the third plea is good. This is not a covenant which runs with the land. It relates to a thing not in esse at the time of the demise, but to be done on the land afterwards. The case, therefore, is within the first resolution in *Spencer's Case* (d), and the assignee, not being named, is not bound. The question does not depend on which party is to do the act. In *Doughty v. Bowman* (e), a lessee for himself, his executors, administrators and assigns, covenanted with the lessor to build four messuages on the land within a specified time from the date of the demise, and to pay rent, &c. By a subsequent indenture, the

(a) 11 Q. B. 769.

(b) 15 C. B. 46.

(c) 11 Exch. 822.

(d) 5 Rep. 16 a.

(e) 11 Q. B. 444.

lessee demised the land to the plaintiff (the houses not having been built), and covenanted with the plaintiff, that he, his heirs, executors or administrators (not adding assigns), would pay the rent reserved by the former indenture, and perform, or effectually indemnify the plaintiff of, from and against all the covenants therein contained on the lessee's or assignee's part to be performed. The lessee afterwards assigned to the defendants. And it was held in the Exchequer Chamber (affirming the judgment of the Court of Queen's Bench), that the covenant to the plaintiff was not such a covenant as would pass with the reversion of the land, and bind assignees not named; and therefore that the plaintiff could not recover against the defendant for not building the wall or indemnifying the plaintiff against eviction for breach of the covenant to build. The doctrine laid down in *Spencer's Case* (a) was there recognised and acted on, and has indeed never been disputed.—He also referred to *Anonymous* (b).

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Welsby, in reply.—The second plea cannot be supported as an equitable defence. In *Stimson v. Hall* (c) *Bramwell*, B., points out, that in *Beasley v. Darcy* (d) the claim and cross claim originated in one transaction: here there is no natural connection between the two claims. The plaintiff's claim arises out of an indenture made anterior to the demise by the defendant to him, and is in respect of a covenant which is materially different from and larger than the covenant in that demise. There is no authority that in such case a Court of equity would grant a perpetual injunction.—Neither is the plea good in avoidance of circuitry of action. That doctrine only applies, either where there would otherwise be a multiplicity of suits and only the

(a) 5 Rep. 16.

(b) 12 Mod. 384, case 643.

(c) 1 H. & N. 831.

(d) 2 Scho. & Lef. 403, n.

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same damages recovered, as in *Dolphin v. Haynes* (a); or where there is a covenant not to sue, which amounts to a release: *Smith v. Mapleback* (b); or where a party has precluded himself from enforcing his claim by having given an indemnity against it, as in *Connop v. Levy* (c). It must be an inability to sue arising from the contract itself. In 2 Wms. Saund., 150 a, note, after referring to *Johnson v. Carre* (d) as an authority that a covenant in the same deed may be pleaded in bar to avoid circuity of action, it is said, "but it is otherwise where the covenant is in another deed, for the last deed does not take away the effect of the former; and a subsequent covenant cannot be pleaded in bar of the former; but the defendant must bring his action upon the last indenture, if he will help himself: *Gawden v. Draper* (e)." Here the breaches are not the same, nor are the damages identical. It is indeed so averred in the plea; but that cannot be true, for there is a period of thirty days to which the plaintiff's covenant does not extend; and the covenants are not co-extensive, for the plaintiff is not bound to repair at all events, but only if timber and iron work is provided by the defendant.

As to the third plea.—In *Doughty v. Bowman* (f) the covenant was partly to do a thing not in esse, and therefore collateral; and partly to indemnify, and therefore personal. Consequently the case fell within the first, not the second, resolution in *Spencer's Case* (g).

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—Two entirely distinct questions arose

(a) Show. Cas. Parl. 17.

(b) 1 T. R. 441.

(c) 11 Q. B. 769.

(d) 1 Lev. 152.

(e) 2 Vent. 217, 218.

(f) 11 Q. B. 444.

(g) 5 Rep. 16 a.

in this case. The declaration was on a demise to the lessee, his executors, administrators and *assigns*, in consideration of the rents and covenants on the part and behalf of the *lessee* and his *assigns* to be paid, done, and performed, of a messuage and lands, with liberty to the lessee, his executors, administrators and *assigns*, to make any erections or buildings. The lessee covenanted for himself, his heirs, executors and administrators (not saying *assigns*), that he, his heirs, executors, administrators or *assigns*, would pay rent; and that he, his executors or administrators, would repair the messuage and farm, outhouses, barns, stable, and all other erections and buildings which should or might be thereafter erected, and all the gates, &c., and the same being so repaired, he, the lessee, his executors, administrators, and *assigns*, at the end of the term would yield up. There was a breach alleged, in non-repair and not yielding up in repair. The third plea was pleaded to a part of this, viz., to so much as complained in respect of a water corn mill, cottages, and other buildings erected and built during the term, and shewed that they were buildings erected during the term, and not erected in place of others previously existing. It was contended that this plea was good on the authority of the first resolution in *Spencer's Case*, the lessee not having covenanted for his assigns.

The state of the authorities in question seems as follows:—The proposition, that a covenant which would run with the land if the assignee were named, does not where he is not named and the thing was not in esse at the time of the making of the covenant, is laid down in *Spencer's Case* (a). The same is to be found in Comyns' Digest, Covt. (C.) 3, citing *Spencer's Case* and Jones, 223, which however does not support the doctrine. It is not found in Rolle. It is in Viner's Abridgement, "Covenant" (L.), where how-

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ever Moor, 159, is cited as establishing the same, when in truth it established the contrary. It is negatively sanctioned by the silence of the author and editors of Smith's Leading Cases, and it is cited in *Doughty v. Bowman* (a), where however, with submission, it was inapplicable. There the question was if an assignee of *the reversion* was bound, which depends on different considerations: 1 Wms. Saunders, 241 d. In Shepherd's Touchstone, 180, it is thus put, "If the lessee covenant for himself, or for himself, his executors or administrators only, to build a *new house* upon the land, the assignee is not bound;" the editor adds, because he is not named. In page 179, *Spencer's Case* is cited, but the case put is of a *new house*. A similar remark applies to *Cockson v. Cock* (b), where a covenant to build de novo is called collateral. But it may be not unreasonably said that to build a new house does not "extend to the support of the thing demised." Indeed Lord Coke thought it waste: Co. Litt. 53 a. On the other hand, Moor, p. 159, pl. 300, (which is evidently *Spencer's Case* though the date is later), gives the decision the other way. The explanation may be, that Lord Coke is reporting a variety of arguments and opinions expressed, while Moor gives the ultimate decision. *Smith v. Arnold* (c) is directly contrary: and in *Bally v. Wells* (d), the contrary is stated. No reason is given for the alleged difference between where the assignee is and is not named; on the contrary the reason given for binding in any case an assignee not named, viz., that he takes the benefit and burthen, seems equally to apply to every such case.

No doubt, as Mr. *Atherton* said, if the law were clearly laid down without contradiction (as he contends it is), it ought to be abided by, though no reason could be given

(a) 11 Q. B. 444.
 (b) Cro. Jac. 125.

(c) 3 Salk. 4.
 (d) 3 Wils. 25.

for it. It would not be enough, to justify a departure from it, that it was without a known reason; it ought to be followed at least, unless contrary and repugnant to other rules and principles. But in deciding which of two conflicting sets of authorities is correct, it is not irrelevant to look at the reason of the thing. No doubt the resolution in *Spencer's Case* has been repeatedly cited, or the same thing said as is said there; but that resolution is the foundation of the opinion; it never appears to have been acted on; on the contrary, *Moor*, 159, and *Smith v. Arnold* are decisions the other way. In the present case we think it sufficient to say, that as the covenant is not a covenant absolutely to do a new thing, but to do something conditionally, viz., if there are new buildings, to repair them; as when built they will be part of *the thing demised, and consequently the covenant extends to its support*, and as the covenant clearly binds the assignee to repair things in esse at the time of the lease, so does it also those in posse, and consequently the assignee is bound. There is only one covenant to repair; if the assignee is included as to part, why not as to all? On these grounds we think the third plea bad.

The second plea was pleaded to the breaches for not repairing and yielding up repaired the same premises; but nothing turns on the time of their erection. The plea states that, while the defendants were assignees of the demised premises, they demised them to the plaintiff for a term short by a few days of their own; that he covenanted to repair and yield up in repair, the defendants finding certain timber and iron work. The plea then alleges that the want of repair complained of by the plaintiff was caused by his default, and was a breach of his covenant, and that they the defendants were ready to find timber and iron work, and that they are entitled to recover from the plaintiff the amount of

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thereafter erected, built or set up during the said demise on the said demised premises, and the wheels, machinery and tackle of the said mill, &c. (reasonable use and wear of the wheels, machinery and tackle only excepted), the defendants, at their costs and expence, finding and providing on the said demised premises sufficient rough timber for the repair of the mill and the wheels and machinery thereof, and also sufficient and proper iron work or castings for the repairing and replacing the wheels and machinery of the mill, when and as occasion should require: and the same being so well and sufficiently repaired, upheld, maintained and kept in repair (except as aforesaid), would at the end or sooner determination of the said demise peaceably and quietly leave, surrender and yield up unto the defendants, their executors, administrators or assigns.—Averments: that the plaintiff entered into the said demised premises under the said lease, and was possessed thereof for the whole of the said term to him thereby granted, and that the dilapidations, defects, want of repair, and supposed breaches of covenant as to which this plea is pleaded, were caused by the neglect and default of the plaintiff during the said term so to him thereof granted, and not by the neglect and default of the defendants or either of them; and were dilapidations which the plaintiff under and by virtue of his said covenant was bound to repair, and no part thereof was caused by such use or wear as in the covenant is excepted; and that the defendants were at all necessary times in that behalf ready and willing to find and provide rough timber, iron work and castings according to the said covenant in that behalf, and were in no default in that or in any other respect: that they are entitled to sue the plaintiff for and in respect of the said breaches of covenant in this plea, and to recover from him the same amount of damages as the amount of damages which the plaintiff seeks to recover

and is entitled to recover from the defendants in respect of the supposed breaches of covenant as to which this plea is pleaded: and that the defendants are ready and willing, and hereby offer to set off and allow to the plaintiff the damages which they are entitled to recover against him against the said damages which the plaintiff is entitled to recover against them: and that at the time of the alleged breaches of covenant as to which this plea is pleaded, there was mutual credit between the plaintiff and the defendants.

Third plea: As to not repairing and not yielding up in repair the water corn mill and buildings erected on the said demised premises during the said term.—That the said water corn mill and buildings were not, nor were nor was any or either of them, or any part thereof, in being at the time of making the said indenture, or at the commencement of the said term, and the same, and each and every of them, and every part thereof, were and was first erected and built after making the said demise, and after the commencement of the said term, and were then entirely new erections and buildings, and were not erected or built in the place of any thing standing or being on the said demised land at the time of making the said demise, or at the commencement of the said term, or at any intermediate time.

Demurrer to both pleas, and joinders therein.

*Welsby* argued in support of the demurrers in last Michaelmas Term (Nov. 18 and 19).—First, as to the second plea. The defence is not founded upon any equitable right arising out of the contract stated in the declaration, but upon a distinct covenant, from which a legal claim arises which may be enforced in a cross action: *Stimson v. Hall* (a).

(a) 1 H. & N. 831.

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for regulating the use and employment of the said clay, brick earth, loam, sand and other produce, and the disposition of the bricks to be made therefrom. Yielding and paying during the said term unto the said Sir E. B. Smyth the yearly rent of 17*l.* 10*s.* for surface rent, by quarterly payments. And also yielding and paying unto the said Sir E. B. Smyth for royalty or brick rent the yearly sum of 100*l.*, clear of all deductions except landlord's property or income tax, to be paid by four equal quarterly payments on the same quarterly days as the said yearly surface rent of 17*l.* 10*s.* And also yielding and paying in respect of every thousand bricks over and above the first million which should be made on the premises, whether made from the brick earth dug from the premises or from brick earth brought thereon, in any one year of the said term, an additional royalty or brick rent of 2*s.*, clear of all deductions except as aforesaid, to be paid on the last day of every year of the said term on which the same should become payable except the last year, in which year the said additional rents (if any) were to be paid on the last day but one of the said term.

The interest in the term granted by the said demise passed to the defendants, and the interest in the reversion belongs to the plaintiff. The defendants have for some years past held and occupied the demised premises, and used, exercised and enjoyed the several powers, liberties and privileges by the said indenture granted to the lessees; and under and by virtue thereof have made and manufactured bricks thereon from clay earth and sand dug and got out of the lands. Bricks were made by the defendants upon the premises demised from materials so gotten, during each of the said years, to the amount of several thousands beyond the one million in respect of which the royalty or brick rent of 100*l.* was in the said indenture reserved,

and in respect of which such royalties and brick rents have accrued due to the plaintiff.

Property or income tax has been from time to time assessed and charged in respect of the said 100*l.* royalty or brick rent, and upon the said other royalty or brick rent at the rate of 1*s.* 4*d.* in the pound, and afterwards and without prejudice to the questions now submitted to the Court, the defendants have paid the same to the Commissioners of Inland Revenue and have paid to the plaintiff the amount of the royalties or rents which have accrued due under the said demise, less the several sums so assessed, charged and paid.

The plaintiff has allowed the amount of income or property tax chargeable upon or payable in respect of the surface rent of 17*l.*, but he contends that such tax is not legally assessable, chargeable, or payable, as landlord's property or income tax, in respect either of the royalty or brick rent of 100*l.*, or of the said royalty of 2*s.* for every thousand bricks made over and above the first million.

The questions for the opinion of the Court are, whether property or income tax can be properly assessed or charged, and upon whom, in respect of the said royalties or brick rents, or either and which of them; and if assessable or chargeable, then, whether the same is landlord's property or income tax.

If the Court shall be of opinion that income or property tax is not chargeable upon or payable either in respect of the said royalty or rent of 100*l.*, or of the said royalty or rent of 2*s.* per thousand bricks, as landlord's property or income tax, and that the plaintiff is not in any way liable thereto or bound to pay or allow any part thereof, then judgment is to be entered up for the plaintiff for the sum claimed.

If the Court shall be of opinion that income or property

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tax can be properly assessed or charged in respect of either of the said royalties or rents of 100*l.* and 2*s.* per thousand, but not in respect of the other of them, and that the same is landlord's property or income tax, then judgment is to be entered up for the plaintiff, and so much of the said sums as in the opinion of the Court is not landlord's property or income tax.

But if the Court shall be of opinion that income or property tax can be properly assessed and charged in respect of both the said classes of royalties or rents, and if properly assessed and charged is landlord's property or income tax, then judgment of *nolle prosequi* is to be entered.

*Lush* (*H. Lloyd* with him), for the plaintiff (*a*).—The case raises two questions: first, whether the royalties or brick rents are chargeable with income tax; and if so, secondly, whether it is to be paid by the plaintiff or the defendants. The 5 & 6 Vict. c. 35, s. 1, imposes “the several rates and duties mentioned in the several schedules” of that Act. These royalties, if assessable at all, are assessable under Schedule (A.), which says,—“For all lands, tenements and hereditaments or heritages in Great Britain there shall be charged yearly in respect of the property thereof, for every 20*s.* of the annual value thereof, the sum

(*a*) The case was argued in last Michaelmas Term (Nov. 9) by *Lush* for the plaintiff and *Bovill* for the defendants, when the Court took time to consider their judgment. On the 24th of November, *Bramwell*, B., said that some members of the Court had entertained a doubt whether, assuming the case to be within Schedule (A.), No. III., Third

Rule, the proper mode of assessment was not to assess the brick rents separately, but to assess the entire profits of the brick-making business, and then to deduct a proportionate part of the income tax from the amount of the brick rents: and as that point had not been adverted to by the counsel, the Court were desirous that the case should be re-argued.

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of 7d." The 60th section prescribes certain rules for assessing the duties under these Schedules:—"No. 1. The annual value of lands, tenements, hereditaments or heritages charged under Schedule (A.) shall be understood to be the rent by the year at which the same are let at rack rent, &c.: which rule shall be construed to extend to all lands, tenements and hereditaments or heritages capable of actual occupation, of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value, *except the properties mentioned in No. II. and No. III. of this Schedule.*" These royalties are not *rent* within the meaning of that schedule, but profits which the landlord makes by the sale of a portion of the land itself. Rent is something paid for the *use* of the land. [*Pollock, C. B.*—In every demise of land, whether of the surface or beneath, the landlord grants not merely the use of the land but sells a portion of the land itself. No grass or corn can grow without taking some of the silex of the earth which forms part of the land. If what is taken is considerable, as in the case of a marble quarry or a copper or coal mine, special provision is made for it in this act of parliament. In the case of brick earth, the value of that which is taken from the corpus of the land is so inconsiderable with reference to the value of the article manufactured from it, that it seems to me, the Act having made no provision for brick earth, the question is, to which of the schedules it is to be referred. *Martin, B.*—Is it not within Rule 6 of No. II. ?] That rule is,—“Of all other profits arising from lands, tenements, hereditaments, or heritages not in the actual possession or occupation of the party to be charged, and not before enumerated;” and they are “to be charged on the receivers of such profits or the persons entitled thereto.” That means contingent or varying profits; and if this case falls within that rule, the duty is not to be assessed on the



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plaintiff but on the defendants. It falls, however, within the Third Rule of "No. III.—Rules for estimating the lands, tenements, hereditaments, or heritages hereinafter mentioned which are not to be charged according to the preceding general rule." The third rule relates to "iron works, gas works, salt springs or works, alum mines or works, water works, &c., and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments or heritages," &c. "The duty to be charged on the person, &c., carrying on the concern, &c., or being in the receipt of the profits thereof, on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value, either between the different persons, &c., engaged in the concern, or to the owner of the soil or property, or to any creditor or other person whatever having a claim on or out of the said profits; and all such persons, &c., shall allow out of such produce or value a proportionate deduction of the duty so charged, and the said charge shall be made on the said profits exclusively of any lands used or occupied in or about the concern." A brick-field is a concern arising out of land, within that rule; the brick-maker is to be assessed in respect of the profit of his trade of brick-making, and there is to be a separate assessment on the landlord, under Rule L, in respect of the land. [*Martin, B.*—The duty is to be charged on the persons carrying on the concern, on the amount of the produce or value, and before paying or distributing it, either to the persons carrying on the concern, or to the owner of the soil, or to any creditor, or any person whatever having a claim to the profits; and all such persons are to allow out of the produce or value a proportionate deduction of the duty so charged; and the charge is to be made on the profits exclusively of the lands used or occupied in or about the concern. Therefore, in

the first place, the clear net profits must be ascertained, and the duty paid on that by the persons carrying on the concern; and then all persons, including the owner of the soil, are to allow out of the profits a deduction of the duty.] In that case the land would be assessed twice over. "All such persons" means the persons engaged or carrying on the concern. The duty is to be deducted as between themselves, and it is to be charged before paying them or the owner of the soil or any creditor. Schedule (D.) is expressly applicable to profits made by trade.

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*Bovill* (*Rochfort Clarke* with him), for the defendants.—These brick rents are properly assessed and the duty is payable by the plaintiff. The title of the Act shews that its object was to impose a duty on profits arising from every description of property. Schedules (A.), (B.) and (C.) having particularised certain properties, Schedule (D.) imposes the tax on profits from *any kind of property*. By section 100, the duties mentioned in Schedule (D.) "shall extend to every description of property or profits which shall not be contained in either of the Schedules (A.), (B.) or (C.)," &c., and shall be paid by the person receiving the same. So, that if this case is not within either of the three first schedules, it is within Schedule (D.) The 60th section prescribes certain rules for assessing the duty under Schedule (A.) No. I. relates to land let at a rack-rent; and it excludes the cases within No. II. and No. III. This case is not within No. I. No. II. relates to cases where there is no occupation by permission of a landlord, but where a person, in the relation of landlord, is entitled to profits arising from the land, as tithes, dues, fines, heriots, &c. The Sixth Rule means "all other profits ejusdem generis." Though these profits are not strictly *rent*, yet they arise out of and are connected with the land. No. III.

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relates to cases where the land is not simply let at a rack-rent, but where the profits arise from the conversion of the soil itself, as in the case of a mine; or from altering the character of the land, by the construction of canals, navigations, iron works, &c. By the Ninth Rule of No. IV., the occupier of any lands, being tenant and paying the duties, shall deduct the same from his rent. By section 63, the duties under Schedule (B.) are to be charged in addition to the duties under Schedule (A.), with certain exceptions. By No. X., Fourth Rule, express provision is made for cases where the amount of rent reserved on lands depends on produce.—He also referred to section 190, Schedule (G.), I., XVII.

*Lush* replied.

POLLOCK, C. B.—We are all of opinion that our judgment ought to be in favour of the defendants, on the ground that the royalties or brick rents mentioned in the case are subject to income tax, and that the plaintiff is liable to pay it. I entertain considerable doubt—indeed more than a doubt—whether brick fields are to be treated as coal mines or salt works, or any of those matters specifically mentioned in the Rules to Schedule (A.), No. III., where the rent is substantially paid for the use of the corpus of the land—for taking it away and converting it to a particular use. My opinion is that the case of a brick field was not intended to be included within No. III. With the public notoriety that property of that description exists to a great extent, especially in the neighbourhood of London, it seems almost impossible, if it was intended to include it, that it should not have been inserted by name in the same category as coal mines or salt works. But I agree with what has fallen from my brother *Martin* in

the course of the argument; and even if this case were within No. III. of Schedule (A.), I should come to the same conclusion. I think that the 100*l.* a year which Mr. *Lush* contended must, from the nature of things, be considered a royalty, is not so, but is a *rent* properly so called. In reality all rent includes the privilege of converting some part of the soil into that which is the produce of the land. Even in the humblest use of land for the purposes of agriculture, some small portion of it is carried away; and in the case of land which is so rich as to be capable of cultivation without manure, still more of it; and considering that the actual value of clay bears so small a proportion to the manufactured article—differing altogether in that respect from coal, salt or slate—I am confirmed by that in my notion that it was never intended to be within these other portions of the Act. In the case of a coal, salt or slate mine, if the landlord refused to accept a royalty, but let the land for a yearly rent, could it be contended that the tenant of the mine would not be entitled to deduct what he paid to his landlord as rent? It seems to me that the landlord would stand in precisely the same relation to the tenant as if it were agricultural land. So if the landlord lets his land out and out, either for building or making a dock or other purposes, for a clear annual rent. Here the tenant agrees to pay 100*l.* a year *as rent*, and the landlord contemplates the payment of the income tax, for it is expressly mentioned in the deed. For these reasons it appears to me that, whether taken in one way or the other, the result is the same; though in my judgment this is merely a dry rent. I do not think that the case is within those provisions of the Act to which Mr. *Lush* has directed our attention, such as salt works, quarries, slate quarries, and other works of that sort.

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MARTIN, B.—I am of the same opinion. The first section of the 5 & 6 Vict. c. 35, grants to the Crown duties upon all lands under Schedule (A.); upon occupation of lands under Schedule (B.); upon the profits arising from annuities and offices under Schedule (C.); and under Schedule (D.) “upon the annual profits or gains arising or accruing to any person from any kind of property whatever.” That is an express enactment that upon all species of profits and property duty shall be paid. Now, it appears that by this lease the representative of Sir E. B. Smyth is entitled to a rent of 17*l.* 10*s.* for the surface of the land. It is not disputed that he must pay the income tax upon that. Next, there is to be paid to him “for royalty or brick rent” the yearly sum of 100*l.* clear of all deductions (*except landlord's property or income tax*), to be paid by four equally quarterly payments on the same quarter days as the said yearly surface rent of 17*l.* 10*s.*” The first question is, what is that yearly sum? It is called “royalty or brick rent.” Mr. *Lush* did not in terms say, but he left it to be inferred, that this was a royalty under the Fourth Rule of No. II. in Schedule (A.). I am clearly of opinion that is not so; for the rule is,—“Of manors and other royalties, including all dues and other services;” and I apprehend that the royalties there mentioned are royalties properly so called; this is nothing of the kind: it is a sum of money annually to be paid for taking away a portion of the soil. I do not mean to bind myself to an expression of opinion that this 100*l.* a year is *rent* properly so called; but I am inclined to think it is, and that it might be distrained for as of common right. The word “royalty” is used in leases of mines of coal and minerals, and it means a sum of money to be paid in respect of a certain portion of the produce of the mine: it is to be paid every year, but is

uncertain in respect of the quantity of coal or mineral got. It seems to me that the word "royalty" in this lease is not a royalty within the Fourth Rule, No. II., Schedule (A.), but that it means a *rent*; and though it is not necessary to express an opinion as to that, my impression is, that upon looking at the old authorities on the subject, it will be found to be a rent properly so called. It is a certain sum payable annually by the tenant in respect of his occupation of the land; and in my opinion that is rent, according to the definition in the old authorities (*a*). That being so, the 100*l.* a year is within the same principle as the 17*l.* 10*s.*: it is a reservation of 117*l.* 10*s.* rent, in two sums of 100*l.* and 17*l.* 10*s.* Further, there is an express provision in the deed, that out of the 100*l.* a year the landlord's income tax shall be deducted. An annual sum is to be paid to Sir E. B. Smyth, and in respect of that he is liable to the income tax, because it is an annual profit arising to him from property in Great Britain. Then, that 100*l.* a year is to represent a million bricks; and after that number has been made, he is to be paid for every thousand above that an additional royalty or brick rent of 2*s.*, clear of all deductions. That is the third head of profit; and except a million bricks be made nothing arises out of it, but if upwards of a million bricks are made, then for every thousand he is entitled to 2*s.*, payable to him in the nature of rent. Mr. *Lush* contended that this falls within the Third Rule of No. III., Schedule (A.). I concur with the Lord Chief Baron that there is considerable doubt whether that is so; but assuming it to be so, it is clear that the income tax is assessable and is to be deducted from the amount payable to the landlord. If the Third Rule of No. III., Schedule (A.), be read with reference to the subject-

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(*a*) See Co. Litt. 142 *a.*; Com. Dig. tit. Rent (A.); Gilbert on Rent, p. 30.

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matter, viz., a demise of a field of brick earth, it will be found that it applies to that, and is very sensible as applicable to it. 'The Rule says,—“The duty in each of the three last rules to be charged to the person, corporation, &c., carrying on the concern,” that is, in this case, on the defendants; and it is to be “on the amount of the produce or value thereof;” and “before paying the produce or the value, either between the different persons or members of the corporation, &c., or to the owner of the soil or property, or to any creditor or other person whatever having a claim on or out of the said profits.” Therefore the profits of the concern are to be taken, and no allowance is to be made in respect of that which the different members of the partnership may be entitled to, or in respect of the payment to the owner of the soil for anything he may be entitled to, or in respect of what might be due to a creditor whether as mortgagee or otherwise, but the profits are to be taken independently of all that. My present impression is, that in taking the account the fixed annual rent of 17*l.* 10*s.* and 100*l.* a year ought not to be included. Mr. *Lush* says that if that construction be put upon the rule, the landlord would pay twice over. I doubt whether that is so. I think that is not what is to be taken into calculation, but only what is payable to the owner of the soil in respect of the 2*s.* a thousand beyond the million. All persons are “to allow out of such produce or value a proportionate deduction of the duty so charged;” that is, in this case, in respect of every thousand bricks beyond the million the duty of 7*d.* in the pound ought to be deducted. So that, assuming that this rule applies, every person will pay what he ought: the owners of the concern will pay in respect of their profits, the landlord will pay in respect of the profits which he derives, and each person will bear his own burthen. I have already

said that it is by no means clear that this case is within that rule, but whether it is or not, it seems to me that the duty is properly payable by the plaintiff in respect of this 2*s.* a thousand beyond the million; and that the answer to the questions submitted to us is, that the defendants are entitled to deduct the tax.

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WATSON, B.—I am of the same opinion. There is a demise of seven acres of land, with power to the lessee to take clay, brick earth, loam, sand, and other materials proper for making bricks, and to make the same into bricks upon the premises for the purpose of sale. There are three reservations: first, there is a surface rent of 17*l.* 10*s.*, then there is a royalty or brick rent of 100*l.* a year, clear of all deductions except landlord's property or income tax, and then for every thousand bricks above the first million an additional royalty or brick rent of 2*s.*, clear of all deductions, except as aforesaid. Then comes the question, what are the two first reservations. The 17*l.* 10*s.* is clearly a surface rent: it is a rent in the strictest meaning of the term. The next is called a brick rent. The word "rent" is a term of art; it means rent properly so called, and which may be distrained for as of common right. Then there is a third reservation of 2*s.* for every thousand bricks above the first million. These payments are what the landlord derives from his property. In construing the Act, it is necessary to look at the first clause which gives the whole principle upon which the taxation takes place. First, there is Schedule (A.), in respect of lands, tenements, and hereditaments. Next is Schedule (B.), in respect of the *occupation* of lands, tenements, and hereditaments. Schedule (C.) has reference to profits arising from annuities, dividends, shares, and matters of that kind. Schedule (D.) relates to the annual profits or gains arising or accruing



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to any person "*from any kind of property whatever.*" Schedule (E.) relates to every public office or employment of profit. It is also provided by Schedule (D.), that the said last mentioned duties shall extend to every description of property or profits which shall not be contained in either of the Schedules (A.), (B.) or (C.). I have gone through the Act with care and cannot find any species of property whatever which is not charged with duty. Section 60 points out how the duty is to be charged under Schedule (A.). Rule No. I. says:—"The annual value of lands, &c., shall be understood to be the rent by the year at which the same are let at rack rent," &c.; and then it says, "which rule shall be construed to extend to all lands, &c., capable of actual occupation of whatever nature, and for whatever purpose occupied or enjoyed and of whatever value," &c.—that would apply to mines, quarries, &c., or the getting of clay whether for the purpose of manufacture or not, in short to all cases where there is an actual occupation. It then goes on to say, "except the properties mentioned in No. II. and No. III. of this schedule." No. II. and III. mention tithes, manors, quarries, mines, iron works, &c., which, but for the exception, would be included in Rule No. I. Then, supposing that a brick field is not within No. II. or III., it is within No. I., for its words are general, viz., "lands, &c., of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value." Mr. *Lush* says that is not so, because the clay is taken and the property in some measure exhausted; whereas No. I. only applies to what can be raised upon the land from year to year. I do not agree with that interpretation. Assuming I am right in saying that this brick rent is not within No. II. or III. of Schedule (A.), it is a profit made by the landlord out of the place by the clay being got and bricks made. To say that rent merely means a reservation in

respect of the cultivation of the surface of the land, is not correct. It would be a monstrous construction, to hold that a landlord might sell the whole of the material beneath the surface and pay no income tax in respect of it. It seems to me that this land, being used as a brick field or for the purpose of getting clay, unless it is within No. II. or III., is assessable upon the amount of profit derived by the landlord. That, I believe, is the true interpretation of the Act. The first, second, and third rules of No. II. have no application to this case. Then the fourth is "of manors and other royalties," &c.; the fifth relates to fines on demise of land; the sixth is "of all other profits arising from lands, &c., not in the actual possession or occupation of the party to be charged and not before enumerated." That applies to something which may be the subject-matter of occupation; and I do not think that this case is within that rule. Then comes No. III., of which the First Rule is—"Of quarries of stone, slate, limestone, or chalk." The Second—"Of mines of coal, tin, lead, copper, mundic, iron, and other mines." This is not a mine, it is more in the nature of a quarry. The Third Rule is—"Of iron works, gas works, salt springs, or works, alum mines or works, water works," &c., and "*other concerns of the like nature.*" These latter words refer to works, &c., of the same kind as those before mentioned; but the digging clay and making it into bricks is a very different matter. Brick works are very common in the suburbs of large towns, and it is remarkable that the legislature has not mentioned them in the Act. I agree with my brother *Martin* that, with respect to the 17*l.* 10*s.* and the 100*l.* a year, the duty is payable on those sums as *rent*. It would be a strange construction of the Act to hold that a person who gets 117*l.* 10*s.* a year by letting his land to make bricks out of the clay, should pay no income tax because

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the undertaking did not return any profit. There is a power to charge the duty on the occupier, and it is to be deducted from the profits payable to the landlord. My opinion therefore is, that the plaintiff is chargeable in respect of these royalties, that the duty is payable in the first instance by the defendants, and that they are entitled to deduct it; and consequently judgment of nolle prosequi ought to be entered.

CHANNELL, B.—I agree that the defendants are entitled to judgment upon the whole matter submitted to our consideration. The plaintiff is owner of the reversion of the lease granted by Sir E. B. Smyth, whereby three several payments were reserved; one of 17*l.* 10*s.*, which I will call a surface rent; another, whether it is called a royalty or a rent, a fixed payment of 100*l.* a year; and the third a varying payment of 2*s.* for every thousand bricks made beyond a million. The two substantial questions are as to the royalty of 100*l.* a year, and the reservation of 2*s.* a thousand bricks; and we are to consider, first, whether an assessment can be made at all in respect of them; secondly, whether it should be so made that, though chargeable in the first instance on the defendants, they should be entitled to deduct it from the sums payable by them to the plaintiff. I am of opinion that the duty can be assessed in respect of these two brick rents, and that the plaintiff is ultimately liable to pay it. According to the case of *Daniel v. Gracie* (a), a right of distress would attach in respect of the 2*s.* a thousand bricks, provided more than a million were made in the course of the year. Then, by the first clause of the 5 & 6 Vict. c. 35, duties are imposed in respect of the several matters defined in the Schedules, (A.), (B.), (C.), (D.) and (E). Schedule (A.) imposes the tax in respect of landed property; (B.) in respect of occupation;

(a) 6 Q. B. 145.

(C.) in respect of profits arising from annuities, dividends, and property of that description. (D.) has a wider operation, and imposes the tax on property not provided for by the three preceding schedules; and when I couple with those four schedules, Schedule (E.), I cannot doubt that the intention of the legislature was to include every species of property. Then, are these brick rents a species of property? They are sums of money which the landlord, by his contract, has a right to receive, and for which, if not paid when due, he is entitled to distrain; and if I can see clearly that the duty is imposed on this property, I cannot avoid coming to the conclusion that he is the person who ought in the result to pay it. The rules relating to Schedule (A.) follow immediately after the 60th section. The material ones are No. I., No. II., and No. III. I am of opinion that Rule No. I. would include this property, unless it is included within No. II. or III.; and if it is in No. I., because it is not in No. II. or III., I think that it is assessable and that the landlord must bear the amount of the assessment. Then, is it within No. II., so as to be taken out of No. I. by force of the exception? I am clearly of opinion that it is not; and I adopt the view taken by my brother *Martin* as to that. It is said that it is taken out of No. I. by the Fourth Rule of No. II., which is,—“Of manors and other royalties, including all dues and other services, or other casual profits (not being rents or other annual payments reserved or charged),” &c. I interpret those words to mean profits of manors, such as fines on admission or alienation, heriots, &c. Then it is said that this property may be taken out of No. I., not by force of No. II., but by force of the Third Rule of No. III.; but if so, I think that, though the assessment is to be made under No. III., the same liability ultimately attaches to the landlord. I agree in the construction which my brother

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*Martin* has put on the second part of the Third Rule of No. II. Therefore, being of opinion that if this property is within No. I., it is assessable and the landlord is ultimately liable to pay the tax; being clearly of opinion that is not within No. II.; but having some doubt whether it comes within No. I. or No. III., I think that our judgment should be in favour of the defendants upon the whole matter.

Judgment of nolle prosequi.

Jan. 26.

ROGERS v. TAYLOR.

Declaration: that the plaintiff was lawfully possessed of certain messuages, belonging to and supporting which were certain foundations, which by reason of his possession of the messuages, the plaintiff of right had enjoyed and was enjoying, and still of

**DECLARATION.**—That before and at the time of the committing of the grievances, &c., the plaintiff was lawfully possessed of certain messuages situate at Coed Poeth, belonging to and supporting which messuages were certain foundations, which by reason of his possession of the said messuages the plaintiff of right had enjoyed, and was enjoying, and still of right ought to enjoy for the support of the said messuages; which foundations the plaintiff was of right entitled to have supported by the land in which the quarries hereinafter mentioned were right ought to enjoy for the support of the said messuages, which foundations the plaintiff was of right entitled to have supported by certain land in which quarries were worked: that the defendant negligently worked the quarries near to the said messuages, whereby the foundations were weakened and the messuages fell. On motion in arrest of judgment.—*Held*, that the declaration was sufficient.

The plaintiff in the year 1824 built a house on certain waste, and in the following year obtained a grant from the Crown of the surface, excepting mines. The house was about thirty yards from a quarry. In the year 1840 the tenant of the owner of the minerals, who claimed a right to take the minerals without making compensation for damage to the surface, began to get stone from under the house, in consequence of which and of the blasting operations the house became untenable. In 1853 the defendant cut away certain supports which had been left under the house, and the house fell in. The Judge left the question to the jury, who found that the plaintiff had enjoyed the right of support for his house on the foundations on which it stood without interruption for twenty years. On motion for a new trial, on the ground that the Judge ought to have told the jury that the enjoyment was contentious and not as of right.—*Held*, that the question was properly left to the jury.

*Quære*, whether, independently of prescription, the owner of the surface has not a right to the vertical support of the subjacent strata, for the surface and for all reasonable buildings put upon it.

worked: that the defendant on divers days and times, without the leave and licence and against the will of the plaintiff, so wrongfully, negligently and improperly, and without leaving any proper or efficient support in that behalf, worked certain quarries of the defendant near to the said messuages; that by reason of the premises the foundations of the said messuages became and were greatly weakened, injured and damaged, undermined and rendered unsafe and unstable, and incapable of supporting the said messuages as they otherwise would have done; and the said messuages cracked and sank in, and part thereof fell down and became and were wholly prostrated, &c.

Plea (inter alia).—That the plaintiff was not possessed of the said messuages or of any part thereof, nor was the plaintiff of right entitled to the said foundations, or the support thereof, or to have the same supported of right by the land in which the said quarries were worked as alleged.—Issue thereon.

At the trial before *Cockburn*, C. J., at the Denbighshire Summer Assizes, it was proved that many years ago the plaintiff had enclosed a piece of land, part of certain wastes belonging to the Crown, in the parish of Wrexham. He built two cottages upon it in 1824, and in the following year obtained a grant from the Crown of the land with the cottages so built upon it, “excepting and reserving to the King and his heirs and successors the mines, minerals and quarries,” with free liberty to the King and his assigns to enter upon the premises, to search, dig for and carry away the same. The property in the quarries was vested in the Marquis of Westminster in fee. One house was about thirty yards from a quarry in which the defendant and his predecessors, tenants of the Marquis of Westminster, had worked for sixty years. At the time the house was built the quarry was very little worked, but the defendant about

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the year 1840 got stones from under the land of the plaintiff, in consequence of which and of the blasting operations the house became untenable. Latterly the stable only was used as a place of deposit for building materials. About the year 1853 the defendant cut away the supports of the roof of the quarry under the house, upon which the walls cracked and the house and stable eventually fell down. The defendant and his witnesses alleged that when the tenants wanted to enter fresh ground for the purposes of mining, the practice was to pare off the soil, which was stated to be about six inches deep, and carry it away before they commenced quarrying, and that they never paid for the surface damaged. It was said that the defendant had driven under the plaintiff's land to get the stone, which was more expensive than working from the surface, in order not to interfere with the plaintiff's property.

It was contended by the defendant's counsel that though the plaintiff might have a right to support for the surface in an unincumbered state, yet, in order to enable him to make out a title to support for his house, he was bound to shew an *uninterrupted* enjoyment of the support *as of right* for more than twenty years; and that the plaintiff had failed to shew such an enjoyment, inasmuch as it appeared that there had been a continuous succession of acts by the owner of the minerals, hostile to and negating any right of support for the plaintiff's house during the whole of the twenty years preceding the bringing of the action; that there had been only a contentious enjoyment, and under such circumstances a grant could not be implied. The learned Judge told the jury that he thought at the end of twenty years after the house had been built the plaintiff would have acquired a right to support, unless in the meantime something had been done to deprive him of it; and that the jury must presume that

the additional burden was put upon the land by the assent of the owner of the minerals, and a grant by such owner of a right of support. He left it to the jury to say, whether the plaintiff had enjoyed the support for the foundations of his house for twenty years. The jury found that the plaintiff had enjoyed the right of support for his house on the foundations on which it stood, without interruption for twenty years.

*J. Brown*, in Michaelmas Term, obtained a rule for a new trial, on the ground that the plaintiff did not prove any right of support for his foundations as alleged: that the learned judge misdirected the jury as to the effect of twenty years' enjoyment of support for the foundations under the circumstance of the case: that he should have told the jury that no right to support was acquired by twenty years enjoyment under the circumstances of opposition and disturbance by the defendant and others which had appeared in evidence: or why the judgment should not be arrested.

*Morgan Lloyd* appeared to shew cause, but the Court called upon

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*J. Brown* to support the rule.—It is not denied that the owner of the surface of land while unincumbered, is entitled as of common right to the support of the subjacent strata: *Humphries v. Brogden* (a). Here the Crown and its grantees, as owners of the surface, are entitled to support for it in its unincumbered state; but if they build a house upon it, they have no right to the extra support for the house until such right is acquired either by grant or prescription. That is the principle of the decision in *Wyatt v. Harrison* (b), and the distinction runs through all the cases. It is not necessary to deny that the enjoyment of support for the house as of right would confer a right to its

(a) 12 Q. B. 739.

(b) 3 B. &amp; Ad. 871.



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continuance, because the evidence in this case shewed that the support was not enjoyed as of right, but was throughout contentious ; and a contentious user confers no right either at common law or under the Prescription Act. [*Martin*, B.—Has not a man, reasonably using his land, a right to support for it ?] In the judgment in *Humphries v. Brogden* (a) it is observed, that the reason of the decision in *Wyatt v. Harrison* (b) was, that the plaintiff could not, by putting an additional weight upon his land, render unlawful any operation in the defendant's land, which before would have caused no damage. In *Stansell v. Jollard* (c), Lord *Ellenborough* distinguishes between the case of a house above twenty years old, and that of one newly built, with reference to the right of the ground on which it is built to lateral support. In *Hide v. Thornborough* (d), *Parke*, B., said, "If there was twenty years enjoyment by the plaintiff of the support of the house from the defendant's land and it was known that the defendant's land supported the plaintiff's house, that is sufficient to give the plaintiff the right to that support." That leads to the inference that the consent of the owner of the servient tenement is material, and that a contentious user would not confer a right. The law is so laid down in *Gale on Easements*, p. 121 :—"In order that the enjoyment, which is the quasi possession, of an easement, may confer a right to it by length of time, it must have been open, peaceable, and 'as of right.' . . . It is obvious that no inference of consent can be drawn, unless it be shewn that he" (the owner of the servient tenement) "was aware of the user and being so aware made no attempt to interfere with its exercise. Still less can such consent be implied, but rather the contrary, where he has contested the right to the user." The learned Judge ought therefore to have called the attention of the jury to the question,

(a) 12 Q. B. 748.

(b) 2 B. & Ad. 871.

(c) 1 Sel. N. P. 457, 9th ed.

(d) 2 C. & K. 250.

whether the support was enjoyed as of right, or whether it was contentious. [*Channell*, B.—The jury appear, from some source or the other, to have had their attention drawn to the point. *Pollock*, C. B., referred to the *Plasterers' Company v. The Parish Clerks' Company* (a).] As to the arrest of judgment, the declaration states that the plaintiff has a right to support for his messuages, &c., without shewing how he has it. [*Watson*, B., referred to *Jeffries v. Williams* (b).] In that case it appeared upon the declaration that the defendant was a wrong doer. That is not so here. In *Hilton v. Whitehead* (c) the declaration was held bad after verdict, for not stating the grounds upon which the right to support was claimed.

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*Morgan Lloyd* was directed to confine his argument to the question as to arresting the judgment.—*Hilton v. Whitehead* (c) was decided before the passing of the Common Law Procedure Act, 1852. The form there given, in the case of diverting water from a mill, alleges simply, "that the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same." The form adopted here substantially agrees with that example.

*POLLOCK*, C. B.—I am of opinion that this rule ought to be discharged. With respect to the application to set aside the verdict, and for a new trial, it seems to me that the learned Judge was right in his direction. The jury negatived all the pleas, and found that the plaintiff had been in possession of the house and had enjoyed the support for his foundations as of right and without interruption for twenty years, and the learned Judge reports that he is satisfied

(a) 6 Exch. 630.

(b) 5 Exch. 792.

(c) 12 Q. B. 734.

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with the finding. It is therefore not necessary to say whether the ownership of the surface of land gives a right to its enjoyment for all reasonable purposes.

Then, as to the arrest of judgment. The declaration discloses a cause of action. It states correctly, that the plaintiff was possessed of a house, and by reason thereof was entitled to support for it. It is not necessary that it should state more particularly how the plaintiff is entitled to such support.

WATSON, B.—I am of the same opinion. First, as to the application for a new trial on ground of alleged misdirection. The house had stood for more than twenty years on ground of which the plaintiff was lawfully possessed by grant from the Crown. It does not appear under what title the Marquis of Westminster and his lessees became possessed of the right of working the mines. But it seems that the defendant has so worked the ground below as to shake and destroy the house, for which the plaintiff claims a right to support. The cases have gone far to shew that there is a distinction between the right to lateral support, and the right to a vertical support by the inferior strata. There is no doubt that every landowner has a right to the support of the land adjoining his own, but where by building he has placed an extra weight upon the soil, he can only acquire a right to lateral support for such extra weight by prescription or grant: *Wyatt v. Harrison* (a), 2 Roll. Abr. 564, tit. Trespass (I.), pl. 1. But *Smart v. Morton* (b), *Humphries v. Brogden* (c), and other cases, establish the general right of the owner of the surface to support of the subjacent strata. And it is to be observed that in the judgment of Lord Campbell, in *Humphries v. Brogden*, no allusion

(a) 3 B. & Adol. 871.

(b) 5 E. & B. 30.

(c) 12 Q. B. 739. See p. 745.

is made to any distinction between land in its natural state and land with houses built upon it, so far as such right to vertical support is concerned. However it is not necessary to decide whether the owner of the surface is entitled to the support of the subjacent strata for buildings put upon it otherwise than by grant or prescription; because, here, the jury have expressly found that the plaintiff had for twenty years the uninterrupted use of foundations sufficient to support his house. Mr. *Brown* contends that the learned Judge did not leave it to the jury to say whether the user was or was not contentious, but the terms of the finding shew that the question must have been brought to their notice; and under these circumstances I have no doubt that the direction was right.

Then as to the arrest of judgment. The real meaning of the declaration is, that the plaintiff was possessed of messuages, and by reason of that possession was entitled to support for them. That is the substantial allegation, and it appears to be sufficient and in accordance with the form in the Common Law Procedure Act, 1852. Without expressing any opinion as to the decision in the case of *Hilton v. Whitehead*, it is sufficient to say that the judgment was in fact not arrested, and in my recollection declarations have been constantly drawn after forms substantially agreeing with that adopted here. I think therefore that the judgment ought not to be arrested; and that, as to both points, the rule ought to be discharged.

CHANNELL, B.—I am of the same opinion. It seems to me that the question of support for twenty years and upwards was in fact submitted to the jury. The learned Judge read the evidence and left the case to the jury in such a manner that, according to his report, the summing up would seem to be free from objection. It is said that

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he might have been more explicit ; but it is clear that the jury appreciated the points of the summing up, from the mode in which they have expressed themselves in their finding ; and if so, the objection does not in reality arise.

Then, as to arresting the judgment ; I think the declaration good. In *Hilton v. Whitehead* (a), which was decided before the Common Law Procedure Act, 1852, it was argued that the right claimed was not a possessory right, and the contest was whether it was or was not possessory. I think that this declaration does proceed on a possessory right. In *Humphries v. Brogden* (b), the Court, in giving judgment referred to the case of *Peyton v. The Mayor, &c., of London* (c), where an easement was claimed, for the support of one building by another, which could only arise from a grant actual or implied ; and where Lord *Tenterden* said :—“ The declaration in this case does not allege, as a fact, that the plaintiffs were entitled to have their house supported by the defendant’s house, nor does it, in our opinion, contain any allegation from which a title to such support can be inferred as a matter of law.” The Court, after citing that passage, go on to say :—“ In the case at bar, we are of opinion that the declaration alleges facts from which the law infers the right of support which the plaintiff claims.” Without going through the declaration in the present case, I content myself with saying that I think it does allege that the plaintiff was possessed of certain messuages, and by reason thereof entitled to the support of the substrata : that is a fact upon which issue may be well taken as to the right to support. Therefore I am of opinion that the rule ought to be discharged.

Rule discharged (d).

(a) 12 Q. B. 734.

(c) 9 B. & C. 725.

(b) 12 Q. B. 739, 748.

(d) Partly reported by J. A. Yonge, Esq.

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Jan. 29.

*A* *SPLAND* had obtained a rule calling on the plaintiffs to shew cause why the judgment signed herein should not be set aside.

The declaration stated, that by an indenture made between the several persons whose names and seals were thereunto respectively subscribed and affixed in the schedule thereto, being subscribers to the undertaking therein-after mentioned, of the first part; and the plaintiffs of the second part: It was (amongst other things) witnessed that each of the several persons parties thereto of the first part, &c., to the extent only of the sum or amount of subscription set opposite to his name in the said schedule, covenanted with the plaintiffs that each had subscribed the sum set opposite to his name in the said schedule for the purpose of establishing a Company by the name of "The Wicklow Mineral Railway," and of applying to parliament for, and endeavouring to obtain an Act to incorporate such Company, &c. And the several parties thereto of the first part, for themselves severally, &c., thereby undertook and agreed with and to the plaintiffs that in the event of the said application to parliament not being successful, or in the event of the said Act not being obtained in the Session of 1855, they the said parties thereto of the first part should and would bear, pay, allow and discharge, all the expences which should have been incurred, whether previously to or after the execution of the said indenture, in or about or with a view to the establishment or promotion of the said undertaking.—  
Averments: That the defendant was a subscriber to the undertaking for 5000*l.*, which sum was set opposite to his

Declaration against a subscriber to a projected railway Company, on a covenant in the subscription contract to pay the expenses in the event of an act of parliament not being obtained. The defendant, who was under terms of pleading issuably, pleaded (*inter alia*) a plea setting out the subscription contract, which also contained a covenant by the subscribers to pay the amount of their subscriptions in such sums and at such places and times as should be required or appointed by the Board of Directors. The plea then averred that the defendant had not been required by the Board of Directors to pay his subscription or the expences. The plaintiff having signed judgment:—*Held*, that the plea was not issuable.

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name in the said schedule: that application was made to parliament for an Act to incorporate the Company, but such application was not successful, and the Act was not obtained at all: that certain expences were incurred in endeavouring to procure the Act.—Breach: Nonpayment by the defendant of such expences.

The defendant, who was under terms of pleading issuably, pleaded (*inter alia*) a plea setting out the indenture verbatim. The indenture contained, besides the covenant declared on, a covenant by the parties of the first part, with the plaintiffs, that they would pay the full amount subscribed by them, "in such sums and at such place or places, and at such time or times as shall from time to time be required or appointed by the said committee or Board of Directors, until the passing of the said Act to be obtained as aforesaid; and after the passing thereof, as shall be required or directed by the said Act, or as the directors or others authorised by such Act shall lawfully direct or appoint." The indenture provided that the Board of Directors should manage and dispose of the capital to be raised and paid in pursuance of the covenants, until other provisions should be made by parliament in that behalf; and that the plaintiffs should be trustees of the covenants for the purposes and in furtherance of the undertaking.—The plea then averred that the defendant had not been required or appointed by the Board of Directors to pay any part of the said subscription or to bear, pay, allow or discharge the said expences or any part thereof.

The plaintiffs having signed judgment on the ground that this was not an issuable plea, the defendant took out a summons at Chambers to set aside the judgment, and, on the parties attending before the Judge, the matter was by consent referred to the Court; whereupon the present rule was obtained, against which

*Bovill* (*H. Lloyd* with him) now shewed cause.—This plea affords no answer to the action. There is an absolute covenant by the defendant and the other subscribers, that in the event of an act of parliament not being obtained within a certain period, they will pay the expences incurred in promoting the undertaking. It is sought to qualify that covenant by the subsequent covenant of the subscribers to pay their subscriptions in such sums and at such times and places as the directors should require or appoint. But the two covenants are independent. The former is applicable to the case of the undertaking being abandoned; the latter has reference to the undertaking being carried on.

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*Aspland*, in support of the rule.—The sole question is whether the plea is issuable. The two covenants must be construed together; and, so reading them, there is an agreement by the defendant to pay towards the expences a sum not exceeding the amount of his subscription, *when required by the directors*. The plea shews that the directors, who alone have authority to manage the funds, have not required the defendant to pay.

Per CURIAM (*a*).—The plea is clearly not issuable: it is no answer whatever to the action.

Rule absolute to set aside the  
judgment on terms, the plea  
to be struck out.

(*a*) *Pollock*, C. B., *Martin*, B., *Watson*, B., and *Channell*, B.



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ANNE MANLEY, Administratrix of THOMAS MANLEY, v.

Jan. 26.

THE ST. HELENS CANAL AND RAILWAY COMPANY.

Certain undertakers of a navigation being incorporated for the purpose of making a canal, and empowered by 28 Geo. 2, c. viii., to take tolls to their own use and behoof; were authorized "to make such and so many bridges as and where they should think

requisite and convenient; and to amend, heighten or alter any bridges, and to turn or alter any highways in, through, upon or near the rivers, cuts or canals, as may in any ways hinder the navigation or passage thereon." The Company made a cut through an ancient public highway near St. Helens, which was then a small village, and carried the highway over the cut so made by a swivel bridge. By a subsequent Act, 11 Geo. 4, c. 1, s. 1, to consolidate and amend the former Act, it was recited "that the navigation cut or canal, and other the works authorized to be made by the recited Act, have been long since made and completed; and by section 48, the Company were empowered to maintain the canal, bridges, &c. By 11 Geo. 4, c. 1, s. 124, all persons were to have free liberty with boats to navigate the said canal for the purpose of conveying any goods, &c. By sect. 141, penalties were imposed on persons leaving open draw-bridges, &c., after boats had passed. A boatman having opened the swivel bridge to allow his boat to pass through, a person who was coming along the road walked into the water just as the boat was coming up to the bridge, and was drowned. It appeared that when the bridge was open the end of the highway abutting on the canal was wholly unfenced. Two lamps had formerly been kept burning, of which one had been removed and the other was out of repair. The jury found that the deceased was drowned by reason of the neglect of reasonable precautions on the part of the canal Company, without any negligence on his own part.—*Held*: First, that the defendants having a beneficial interest in the tolls were liable to an action, as any other proprietors of private property would be, for a nuisance arising from it.

Secondly, that the bridge at the time of the accident was in the possession of the defendants, and that the action was therefore properly brought against them and not against the boatman.

*Quære*, whether the Company had power to erect a swivel bridge to cross the highway, intersected by their works, over the canal, but, assuming that they had such power:

*Per Pollock, C. B., and Martin, B.*, the recital in the 11 Geo. 4, c. 1, was not a legislative declaration that the bridge was sufficient at the time of the passing of the Act.

*Held*, further, that, whether or not the bridge was sufficient at the time it was built, the Company were bound to maintain a bridge sufficient with reference to present state of circumstances; and that the jury were warranted in finding a bridge to be insufficient which, when open, left an unfenced gulf in the highway into which a person passing along the road without any fault of his own was liable to fall.

*Held* also that, under such circumstances, the representative of a person killed by falling into the canal while passing along the highway was entitled, under the 9 & 10 Vict. c. 93, to maintain an action against the defendants.

the two parts of the highway, and when their vessels had passed, might close the bridge again across the canal, so as to connect the two parts of the highway: that the bridge and canal were so constructed that, when the bridge was opened, part of the highway projected over the water, so that any passenger on the said part of the highway, passing towards the canal, if he passed to and off the end of the said part over the canal, would fall into the canal; the water there being of great depth: Yet the defendants, knowing the premises, in the night time, when the bridge was lawfully opened by a person navigating the canal, wrongfully and negligently suffered the end of the highway, where it projected over the canal, to be without any fence or contrivance to prevent persons passing along the highway, towards the canal, from passing off the same into the canal, and without any light, watch or contrivance, to warn persons, passing along the highway, of the disconnection of the highway caused by the opening of the bridge; by means whereof the deceased, who was passing along the highway, passed to the end of, and off the said part, and into the canal, and was thereby drowned.

Plea.—Not guilty. Whereupon issue was joined.

At the trial before *Channell*, B., at the last Liverpool Summer Assizes, it appeared that the canal of the defendants intersected an ancient public highway, leading from St. Helens to Blackbrook, which existed as a highway before the making of the canal. At the point of intersection was a swivel-bridge, and the way across the bridge is part of the highway. At about 8 o'clock in the evening of the 22nd of October, the deceased, who was passing along the highway from St. Helens to Blackbrook, fell into the canal, the bridge having been opened to admit the passage of a barge which was coming up. There had formerly been two lamps at the point of intersection, but the one on the St. Helens

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side of the canal had been removed for some years, and the other was out of repair. There was no fence, and no watchman to stop persons passing on the highway when the bridge was open. Many witnesses stated that the bridge was dangerous, and that they had complained of the want of lights.

On this evidence the defendants' counsel contended, first, that the legislature had authorized the Company to make the bridge without imposing on them the duty of protecting the public against the danger created by it (a).

(a) The 28 Geo. 2, c. viii.—“An Act for making navigable the river or brook called Sankey Brook, and the three several branches thereof, from the river Mersey below Sankey Bridges, up to Boardman's Stone Bridge on the south branch, to Gerard's Bridge on the middle branch thereof, and to Penny Bridge on the north branch thereof, all in the county palatine of Lancaster; and also for adjusting the measure of coal to be brought down the said river or brook, and sold within the town of Liverpool, in the said county,”—empowers the Company “to build, erect, set up, and make over or in the same river or brook, or the three branches, streams, cuts, canals, and watercourses aforementioned, or upon the lands adjoining or near to the same, or any of them, such and so many bridges, sluices, locks, weirs, pens for water, stanks, dams, wharfs, warehouses, keys, landing places, weigh beams, cranes, and other works, ways and privileges, as and where they, the said undertakers, their heirs, assigns, or nominees, shall

think requisite and convenient, and from time to time to alter, repair, and amend the same; \* \* \* and also to amend, heighten, or alter any bridges, and to turn or alter any highways in, through, upon, or near the same river or brook, branches, streams, cuts or canals, as may any ways hinder the navigation or passage thereon.”

By sect. 12, the undertakers are empowered “to ask, demand, recover and take, to and for their own proper use and behoof, in respect of their charges and expences, for all goods, wares and merchandizes and commodities whatsoever, which shall be carried or conveyed up or down the said river, &c.,” certain tolls.

The 11 Geo. 4, c. l.—“An Act to consolidate and amend the Acts relating to the Sankey Brook navigation in the county of Lancaster, and to make a navigable canal from the said navigation at Fidler's Ferry, to communicate with the river Mersey at Widness Wharf, near Westbank in the township of Widness in the said county,”—reciting that, “Whereas the navigation, cut or canal, and

Secondly, that, supposing any action to be maintainable, it should have been brought against the boatman. The learned Judge reserved leave to move to enter a nonsuit on both points, and directed the jury that, the company being in possession of the bridge, were bound to take all reason-

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other of the works authorized to be made by the said recited Acts, have been long since made and completed," — by sect. 3 incorporates the proprietors of shares in the capital which, by s. 9, is to consist of 96,000*l.*, divided into 480 shares of 200*l.* each."

Section 48 enacts, "That the said Company of proprietors shall be and they are hereby authorized and empowered, from time to time and at all times hereafter, by themselves, their respective deputies, agents, officers, workmen, and servants, to maintain and support the said cut or canal so made as aforesaid, under or by the authority of the said Acts hereby repealed or either of them, together with the several buildings, erections, locks, quays, wharfs, reservoirs, tunnels, culverts, weirs, basins, bridges, cuts, feeders, drains, soughs, buildings, engines, and other works belonging thereto, &c."

Section 124 enacts, that all persons shall have free liberty "with boats, barges and other vessels to navigate, pass, repass and use the said navigation, cuts or canals, or any of them, for the purpose of carrying any goods, wares or merchandize."

Section 141 enacts, "That if any swivel bridge or draw-bridge, already made and erected, or which shall be made and erected, for the accommodation or at the

expence of any owner or occupier of any lands parted by the said navigation, cuts or canals, or any of them, or any trenches, or passages for water, already made or to be made by virtue of this Act, shall at any time be opened by any person or persons for the passage of any boat or other vessel, all and every person or persons opening any such swivel bridge or draw-bridge, for the passage of any boat or other vessel shall from time to time, so soon as such boat or other vessel shall have passed such bridge, shut and fasten the same; and every person neglecting so to do shall forfeit and pay for every such offence a sum not exceeding forty shillings; and in case any such bridge shall be left open longer than necessary for the passage of any boat or other vessel as aforesaid, through the neglect or carelessness of any person belonging to any such boat or vessel, then the master or owner of such boat or vessel shall forfeit and pay for every such offence any sum not exceeding forty shillings; and if any person or persons shall wilfully open any such swivel bridge or draw-bridge, when no vessel is to pass through the same, every person so offending shall for every such offence forfeit and pay a sum not exceeding five pounds, &c."

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able precautions to make it safe for persons passing along the road after dark; and he asked them whether, from want of reasonable precautions on the part of the defendants, the highway was dangerous at the time when the deceased fell into the canal, and, if so, whether the accident was occasioned by the improper conduct of the defendants in this respect, or whether any thing on the part of the deceased contributed to the accident. The jury found, on both points, against the defendants, and a verdict was entered for the plaintiff.

A rule having been obtained to enter a nonsuit accordingly, and also to arrest the judgment,

*Edward James and Mihoard* shewed caused (Jan. 19).—First, the declaration alleges that the defendants were possessed of the bridge, and that allegation is not traversed. Secondly, the boatman was not liable. The passage through the bridges by boatmen is regulated by 11 Geo. 4, c. l., ss. 124, 141 (*a*). The boatman had done nothing wrong. He had a right to open the bridge to enable his boat to pass through; the boat had not passed, and it did not appear that the boatman had left the bridge open too long. Thirdly, the defendants had no power under their Act to construct or maintain a swivel or draw-bridge across a public highway. If they have not such a power, and any person passing along the highway is injured by reason of their bridge being so constructed, they are answerable. A power to “erect, build, set up and make” over, or in the rivers, cuts, &c., “such and so many bridges as and where they shall think requisite and convenient” (28 Geo. 2, c. viii., s. 1.) does not enable them to construct swivel or draw-bridges. Nor does the power in the same section, “to amend, heighten or alter any bridges, and to turn or alter any highways in, through, upon or near the rivers, cuts

(*a*) *Anté*, p. 843.

or canals, as may in any ways hinder the navigation or passage thereon," authorize them to cut through a highway, by opening a draw-bridge, at every hour of the day. The 25th section, which provides that, "if the undertakers shall make any new cuts by reason whereof any persons shall not have convenient ingress or egress to or out of their lands, the undertakers shall maintain such sufficient bridges as by the commissioners shall be directed," relates only to cases where the undertakers cut through the land of private individuals. The same observation applies to section 28. In short wherever any clause of the Act contains words which would authorize the erection of a swivel bridge to carry a way over the canal, it will be found to apply to private ways only. The 11 Geo. 4, c. l., s. 47, contains provisions similar to those of 28 Geo. 2, c. viii., s. 1. Section 48 empowers the Company to maintain and support the canal and works. Now, assuming that the 11 Geo. 4, c. l., s. 1, recognises that the draw-bridge was properly made in pursuance of the 28 Geo. 2, c. viii., s. 1, it is shewn that the works connected with it, that is to say, the lamps which made it safe have not been kept in repair. By s. 98, the Company are to make "a good and sufficient bridge or bridges, arch or arches, or passage or passages across the canal, and other works thereby authorized or intended to be made, in all places where the same shall cross any carriage road or horse road or footway, either public or private, for the use of the public or of the persons entitled to use such roads or ways respectively, &c." By s. 99, in all places where the line of the works thereby authorized shall be made across any public carriage road, the ascent, &c., shall not be greater than one foot in thirty feet; and a good and sufficient fence shall be made on each side of every such bridge, which fence shall not be less than four feet above the surface of such bridge.

The Court (Jan. 26) called on

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*Monk, R. A. Cross and Malcolm Kerr*, to support the rule.—On the points reserved, the plaintiff ought to be nonsuited. First, the defendants are sued for a matter done by them under the provisions of an act of parliament, and are in the same situation as the trustees of a turnpike road or similar public body, who are not liable for an injury done to an individual by their works so long as they do not exceed the powers conferred by their Act: *The British Cast Plate Manufacturers v. Meredith* (a), *Rex v. The Bristol Dock Company* (b), *Boulton v. Crowthor* (c), *Rex v. The London Dock Company* (d). [*Martin, B.*—There is a distinction between a public body acting entirely for the public and one acting partly for the public and partly for their own benefit. *Pollock, C. B.*—This case does not in the least resemble that of a turnpike trust. The authority of the trustees there is to take the tolls, and dispose of them in the way pointed out by the Act, *i. e.*, pay the expence of the Act, repair the road, reduce the debt, &c. But the money received is not the money of the trustees. They may indeed borrow money if necessary, but cannot put one farthing of it into their own pockets. Whereas the present Act, 28 Geo. 2, c. viii., s. 12, enacts, that in consideration of the great charges the undertakers will be at, &c., it shall be lawful for them to take “to and for their own proper use and behoof, in respect of their charges and expences as aforesaid, for all goods, &c., the rates, tolls, and duties” thereafter mentioned. *Watson, B.*, referred to *Scott v. The Mayor of Manchester* (e).] Secondly, the works of which this bridge was a part have been declared sufficient by the legislature. The 11 Geo. 4, c. l., s. 1, recites “that the navigation cut and other of the works

(a) 4 T. R. 794.

(d) 5 A. &amp; E. 163.

(b) 12 East, 429.

(e) 1 H. &amp; N. 59; 2 H. &amp; N. 204.

(c) 2 B. &amp; C. 703.

authorized to be made by the 28 Geo. 2, c. viii., have been long since made and completed;" and, by section 48, the Company are authorized and empowered to maintain and support the said cut or canal so made as aforesaid under or by the authority of the said Act, together with the several buildings, bridges and other works belonging thereto. [*Pollock*, C. B.—There are two answers to that argument. First, if the bridge was not sufficient originally that statute did not make it so. Secondly, although sufficient 100 years since, it may be totally insufficient now in the altered state of the circumstances consequent upon the increased population and traffic on the road.] The question is whether the bridge when constructed, satisfied the requirements of the Act; if so, the 48th section empowers the Company to maintain it, whether sufficient or not. The bridge being thus sanctioned by the legislature, the undertakers of the works cannot be liable for an accident caused by its insufficiency: *Rex v. Pease* (a). Suppose the legislature had authorized this Company to build a bridge a certain number of yards wide, no altered state of circumstances would render them liable to maintain a wider bridge. Thirdly, the insufficiency of the bridge is a public wrong—an injury to all the Queen's subjects, in respect of which no individual can maintain an action, unless he has sustained a peculiar damage: *Rex v. The Bristol Dock Company* (b), *The Caledonian Railway Company v. Ogilvy* (c). Fourthly, at the time the accident happened, the bridge was not under the control of the defendants but of the boatman, who had altered it from its natural position in order that he might pass with his boat, so that the defendants did not do the act which made the highway dangerous. *Brown v.*

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(a) 4 B. &amp; Ad. 30.

(b) 12 East, 429.

(c) 2 Macqueen, 229.



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*Mallett* (a) shews that the defendants are not liable, unless the bridge was in their possession and under their control at the time of the accident. It is consistent with the declaration that the defendants were possessed of the bridge, not absolutely, but only for others to take possession of and use and have the control of from time to time. Lastly, the declaration is bad for not averring that the bridge was under the control of the defendants: *Hancock v. The York, Newcastle and Berwick Railway Company* (b), *Metcalf v. Hetherington* (c). [*Pollock*, C. B.—I have no doubt that without any great mechanical ingenuity arrangements might be made to render this kind of bridge safe. I throw out this—not however as part of the judgment of the Court)—that there might be some contrivance of such a nature, that when the bridge is moved and consequently danger created, an obstacle should immediately come up which would prevent a man in the dark, or who is blind, from falling into the canal, unless indeed he should choose to climb over the obstacle.]

*POLLOCK*, C. B.—We all think this rule ought to be discharged. It has been urged that what was done by this Canal Company was done by them under the authority of an act of parliament passed many years ago, and with the same responsibility as attaches to the trustees of a highway, or other persons acting in the performance of functions entrusted to them by statute. I do not think that argument can prevail. The owners of this canal are to be looked on as a trading Company, who, though the legislature permits them to do the various acts described in these statutes, are to be considered as persons doing them for their own private advantage, and are therefore personally

(a) 5 C. B. 599.

(b) 10 C. B. 348.

(c) 11 Exch. 257.

responsible if mischief ensues from their not doing all they ought, or doing in an improper manner what they are allowed to do. By the statutes, the Company are permitted, in certain cases, to make swivel bridges; in the present instance they are not expressly permitted to do so; all they are required to do, when their canal crosses a highway, is to make a sufficient bridge. Now it may very well be that, 80 or 100 years ago, when the population and the communication between these places were small, so that there was little occasion to use the highway, a swivel bridge may have been sufficient; but it may not be sufficient now; and the jury have so found. I cannot help thinking that, in modern times, human life is looked on as of greater value than in olden time. There were many precautions against danger with which our ancestors were satisfied, which do not accord with the improved views which are now taken both by Judges and jurymen respecting the preservation of human life and health. Independently, therefore, of any considerations drawn from changes in population or commerce, the jury here were justified in saying,—“whatever juries 100 years ago would have thought, we think this bridge not sufficient, for it is such as may cause a man to lose his life without any fault on his side.” The defendants are responsible in this case, for there is no reason to question either their liability or the verdict of the jury.

The present rule has a further aspect, viz., to arrest the judgment. There is no ground for doing so. The only plea is Not guilty, and the statement of the cause of action in the declaration is, in my judgment, sufficient.

MARTIN, B.—With respect to the first point, viz. that there is no distinction between this Company and the trustees of a highway, it seems to me there is a most obvious one. It

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appears that in the twenty-eighth year of the reign of King Geo. 2, a certain number of persons were authorized to make this canal, and I find by the recital of the 11 Geo. 4, c. 1., that these works were made. The property in them was divided into 480 shares. Now, I have no doubt, that the shares in this canal constitute a most valuable property, and that there is no analogy whatever between the condition of this Company and that of persons who exclusively and entirely act for a public trust. These are persons to whom the legislature gave the privilege of forming and completing a most valuable private property, and are as much responsible for an injury from works connected with it as any other owner of private property would be.

Then it was said,—this particular bridge was made before the 11 Geo. 4, c. 1., and the recital of that Act must be taken as a legislative declaration that it was a perfect bridge; but I do not think the Act supports that argument. There is a recital that “the navigation cut or canal, and other of the works authorized to be made by the said recited Acts, have long since been made and completed”; but the legislature does not say, and certainly never intended to say, that all the bridges on this canal were complete. This is nothing more than a private Act, in the recitals of which the legislature simply adopted what the company submitted to them; and neither in words nor sense passed any judgment on the fitness of this bridge.

It is perfectly clear what is the common law obligation of persons who make canals of this kind. They may make a bridge, but common sense points out it must be a proper bridge, and fit for travelling over; and I agree with the Lord Chief Baron that, if we were now discussing what kind of bridge it ought to be, I should say a bridge suitable to the present state of society. I have no doubt that, when this bridge was built, the place near it was a small village; now

it has thousands of inhabitants; and to hold that the same bridge which would suffice formerly will do so now, when the place has become a great manufacturing town, would be utterly contrary to reason and good sense. Courts of law must look at these matters with reason and common sense, and these tell us that undertakings of this sort must be conducted so as to meet the exigencies of society. Is it fitting then that, in the town of St. Helens, there should be a bridge which, when opened, as it may be at any hour of the day or night, shall leave a gulf in the highway entirely without protection? That is a question for the jury, and all persons would concur that the only verdict they could have found was that which they have found. Had they found the contrary, I should have dissented from their verdict, and thought it a fit one to set aside.

Next it is said the boatman is responsible, and not the defendants. It is truly alleged in the declaration that the boatman was not guilty of any negligence; he had a right to navigate the canal by day or night, and open this bridge for that purpose. Where then is the negligence? Surely on the part of the defendants in not providing a sufficient bridge. If I were asked what kind of bridge they ought to provide, I should say an ordinary stone bridge, such as is found on all canals; but these persons, for their own profit, will not incur the expence of making one. It may well be, that a joint action would have lain against the Company and the boatmen if they were guilty of negligence; but here the boatman was guilty of none, and the only persons to whom blame attaches are the Company, for not having a proper bridge. Then, if they have such a bridge as this, they should have sufficient lights, or persons guarding it, or some such mechanical contrivance as my Lord Chief Baron has described, to prevent persons who lawfully travel on the highway from falling into the canal.

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Then it is said that all the Queen's subjects are concerned in this matter, and consequently no action can be maintained by an individual who is injured. The first part of this is true, because all the inhabitants of that neighbourhood may have occasion to use this road. But as to the second, I never had a doubt that an action lies where there is a public wrong, provided an individual sustain a particular injury from it. If the deceased had fallen into the canal, and broken his leg, he might have maintained an action; and Lord Campbell's Act gives the widow an action when death is caused under the like circumstances. At the time this rule was moved, I was under the impression there had been some fault in the boatman, but, on examination of the facts, I am satisfied that the verdict is right.

As to arresting the judgment, the declaration is perfectly good.

WATSON, B.—I am of the same opinion. I did not hear the argument on the part of the plaintiff, I only heard that of the defendants. I think that the declaration is good, and that the verdict supports it. The case is neither more nor less than this: certain persons are empowered to make a canal through a district, not merely for the benefit of the public, but to expend money and derive benefit and profit from the use of the canal. A statute gives them power in the course of that undertaking to interrupt a public highway,—a thing which can only be done by the authority of parliament,—and to make a bridge which shall open so as to let boats pass. So far, the company are justified in what they did; but they are not like the trustees of a public highway, who are allowed to stop a public way in order that their own work may be of use. The ground on which I decide the present case is, that if parliament empowers persons to interfere with a public highway they may do it,

but not so as to prejudice the lives and limbs of people. For instance, a gas company or a water company may put pipes through streets, but must not do it in such a way as shall prejudice persons passing by; they may make trenches in streets, but are bound at night to place lights, &c., so as to prevent the Queen's subjects being injured. That is the principle,—the power must be exercised reasonably, and not to the prejudice of the public; and that is also the effect of this verdict as I read it, and I think any other verdict would be erroneous.

Several objections have been suggested to the plaintiff's right to recover. First, that this company is like ordinary public trustees, as, for instance, turnpike trustees; but that is not so. Such persons are empowered to collect tolls, not for the benefit of themselves, but of the public; they are public officers discharging public duties for the benefit of the public.

The next objection is, that this bridge was declared sufficient by a subsequent statute. The opinion I have already expressed sets that objection aside. If parliament even had said the bridges were then sufficient, that would not absolve the Company from using all due and proper diligence to prevent injury from them. Therefore, if a bridge is so constructed as to be opened in the night, it ought to be lighted and watched. The bridges may have been made in the right place, and in the right way; but the statute does not say that those bridges *alone* are a sufficient protection to the public. This objection is therefore not sustainable.

Then it is said this is an injury to an individual from a public nuisance, and therefore not actionable. It is quite clear that any injury to a public right is indictable, and that a person can only maintain an action in such a case when he has sustained individual damage from it. But that is not this case,—a disturbance of a public right is

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authorized by statute, but the injury is caused by the negligence of the parties.

Then it is said this bridge was not in the control of the company at the time the accident happened. In whose control was it then? Not the boatman's, surely. Boatmen have a right to go through at all times, and consequently have a right at all times either to open the gates for themselves, or require the persons in charge to open them. I am now looking not merely to the pleadings, but to the justice of the case upon the facts. The canal and bridge were in the sole control of the Company; the boatman was not the person to put up lights and guards; if he had attempted to make the bridge more safe, the Company could have brought an action against him.

It is said that *Brown v. Mallett* is a case in point, to shew the declaration bad, but it is the strongest possible case against the defendants. In that case the defendant was not responsible because what caused the mischief was not in his power or under his control; here it is otherwise.

The declaration is therefore good, for it discloses a proper cause of action, and the verdict is in accordance with law, justice, and the facts of the case.

CHANNELL, B.—This rule asks us to arrest the judgment, or to enter a nonsuit. Having heard the argument and the judgments of the other Barons, I think it ought to be discharged.

As to the arrest of judgment, the case is distinguishable from *Brown v. Mallett*. The declaration states that the defendants were incorporated under a certain statute, which it sets out; that the Company were possessed of a canal, &c. (his Lordship read the declaration). I am of opinion that this declaration does allege a sufficient possession of the canal and bridge by the defendants for the purposes of the statute,

and that the bridge may be lawfully opened in such a way as to throw on them the duty of taking the reasonable and necessary precautions while it is open. So far, therefore, as relates to arresting the judgment, the rule must be discharged.

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Then as to entering a nonsuit. The case is brought before us on two points raised at the trial; for there is no complaint as to the finding of the jury not being warranted by the evidence. It is necessary to look at the facts. It appears that this canal intersected an ancient highway, and there can be no doubt the Company had power under the statute to erect bridges. Whether that power extends to the construction of a swivel bridge, to connect two parts of an interrupted highway, may be open to some doubt. But in this case I should think the Company might do so. It is not pretended there was any light on the line of the bridge, or any watchmen; but if the Company are authorized to make a swivel bridge, they must make one which shall be safe for the public. And as it is one liable to be opened, I assume that they are bound to take *some* precautions with reference to it, and I accordingly requested the jury to say whether the Company had taken such precautions, and whether, in consequence of their not having done so, the deceased fell into the canal and was drowned. I cannot say that at the trial the matter was much considered by me, for it appeared to me a question fit to be reserved for the consideration of the Court as requiring a more particular examination of the statutes, and I thought it the safest course to take the opinion of the jury on the facts, reserving the two points. My mind was not at first free from doubt respecting them; but now, having heard the arguments of counsel, and the observations of the Lord Chief Baron and the other Barons, I think this branch of the rule also ought to be discharged.



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The questions are : First, is the action maintainable at all? Secondly, if so, whether against the present defendants or the boatman? As to whether the action is maintainable at all, the first question is, was there an unqualified power given to the canal company to construct this bridge for the purpose of connecting the two ends of the highway in any manner they pleased, without taking *any* precautions for the public safety? If that appeared on the face of the statute, there would be some difficulty in maintaining the action; and the case would be like that of *Rex v. Pease*, where power was given to a company to construct a railway, and an unqualified liberty to run engines upon it; and it was held that, though the works of the company were, in a certain sense, a nuisance, still the company were not liable for injury resulting from them, seeing they were warranted by statute. But on the best consideration I can give the statutes before us, I think this Company had no such unqualified authority. They have power to intersect the highway, and to erect bridges. Perhaps there is no obligation binding them to make fixed bridges in every case where the canal crosses a highway; but if they have a right to make swivel bridges, there supervenes, on the statutory right, a common law obligation to accompany such a bridge with all necessary surrounding protection; and the jury have found that they did not do so.

But it is further said, supposing that is so, and that the Company are bound to take *some* precautions, what is established against them is a nuisance, and one of a public character, affecting the highway; and that an action is not maintainable by reason of the damage having resulted from a wrong of which the party injured had only a right to complain in common with the rest of the public. But that has been sufficiently answered by the other members of the Court. Suppose, instead of being drowned, the deceased had fallen

into the canal and broken his leg, surely he could have maintained an action. Therefore this objection fails.

The next is, that the action, if maintainable, is not maintainable against the Company. We must take that question with reference to the facts and pleadings. It appears to me, that whether the Company were in possession of the bridge is not put in issue by not guilty (a). But without taking that narrow view, here was a bridge constructed by a Company for the purpose of assisting their canal traffic, and I think that on the evidence, as well as on the pleadings, the defendants were possessed of this bridge at the time of the accident, though the bridge was turned aside at that moment by a person who was no agent of theirs. And no action could be maintained against the boatman, for, when the accident happened, the boat was only coming up, so that the proper time for closing the bridge had not arrived.

Therefore, although not free from doubt during the argument, I am now clearly satisfied the plaintiff is entitled to maintain his action.

Rule discharged. (b)

(a) See *Dunford v. Tratlles*, of the argument in this case were  
12 M. & W. 529. reported by W. M. Best, Esq.

(b) The judgments and part

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By indenture, the defendant demised to the plaintiffs a coal mine for a term of years, with liberty to dig and sink pits, &c., for obtaining the coal; and the defendant covenanted with the plaintiffs that they might peaceably and quietly have, hold, occupy, possess and enjoy the mine during the term, without any molestation, interruption or disturbance whatever of, from, or by the defendant. After the making of the indenture the defendant excavated a quarry of ironstone, lying under some of the closes under which the demised mine was situate, but above that mine; and made holes from the strata of ironstone

**T**HIS was a special case stated under the 5th section of the Common Law Procedure Act, 1854, by an arbitrator, to whom all the matters in dispute in the action were referred by order of a Judge made by consent.

The declaration stated, that by an indenture made the 1st November, A.D. 1844, between the defendant and one William Stenton, since deceased, of the one part, and George Shaw of the other part, the defendant and W. Stenton did demise, lease &c., unto G. Shaw, his executors &c., all that mine, vein, bed or seam of coal of them the defendant and W. Stenton (describing it), together with free liberty, power and authority for G. Shaw, his executors &c., from time to time, and at all times thereafter, to make, dig, open and sink such pit or pits, shaft or shafts, &c., as they might think necessary and requisite for the obtaining &c., the said mine, bed, vein or seam of coal &c.: habendum, for the term of twenty-five years, at certain rents thereby reserved. And the defendant and W. Stenton, for themselves, their heirs, executors and administrators, did covenant &c., with G. Shaw, his executors &c. (inter alia), that G. Shaw, his executors &c., "should and might peaceably and quietly have, hold, occupy, possess and enjoy, all and singular the said mine, bed, vein or seam of coal &c., for and during the said term of twenty-five years thereby granted, without any let, suit, trouble, molestation, interruption or disturbance

into the demised mine; and thereby caused quantities of water to percolate into the demised mine; and the defendant also by excavating the quarry caused parts of the roof of the demised mine to fall in, and by reason of the premises the demised mine became flooded, and the working of the coal was rendered impracticable.—*Held*, that though the defendant had a right to excavate the quarry, yet as the excavation had caused an interruption of the plaintiffs' occupation of the demised mine, the defendant was liable for a breach of his covenant for quiet enjoyment.

whatever, of, from, or by them the defendant and W. Stenton, their heirs, executors &c., or any of them, or any other person or persons whomsoever claiming or to claim, by, from, through, under, or in trust for them or either of them. Averments: that W. Stenton made his will, and being seised of an undivided moiety of the reversion of and in the demised mine, devised the same to certain trustees: that W. Stenton afterwards died: that by an indenture made after his death, G. Shaw assigned to the plaintiffs all his interest in the demised premises for the residue of the term, and that the plaintiffs entered.—Breaches: that the defendants excavated certain mines of ironstone lying above the demised mine, and made divers holes through the mines of ironstone into the demised premises, and thereby caused large quantities of water to flow into the demised premises, by means of which the roof of the demised mine was cracked and injured &c.—The declaration concluded with a claim by the plaintiffs of a writ of injunction to enjoin the defendant from further troubling, molesting or disturbing them in the manner aforesaid in their possession and enjoyment of their said mine and premises.

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Pleas.—First: that the defendant did not commit the breaches alleged in the declaration, or any part thereof. Secondly, as to the claim for an injunction: that the defendant doth not, nor did, continue to trouble, molest, or disturb the plaintiffs as alleged.—Issues thereon.

The arbitrator, by his award, found (so far as material to the present question) as follows.—I find, that the defendant, after the making of the indenture of assignment, did excavate, quarry, work and remove certain mines, beds and strata of ironstone, lying within and under some of the several closes, inclosures or parcels of land, within and under which the mine, vein, bed or seam of coal demised by the indenture of lease of the 1st November, 1844, was

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situate; but above the said demised mine, bed, vein or seam of coal, that is to say, between the surface of the soil of the said closes, inclosures or parcels of land, and the said demised mine, bed, vein or seam of coal; and also bored and made certain holes from, through and out of the said mines, beds and strata of ironstone, down to and into the said demised mine, bed, vein or seam of coal, and thereby caused certain quantities of water to percolate and flow down to and into the said demised mine, bed, vein or seam of coal, and to lodge there. And I do also find, that by his so excavating &c., the said mines &c., of ironstone, the defendant caused parts of the roof of the said demised mine to be, and the same were, crushed, cracked, weakened and injured, and fell in: that I do find, &c., that by reason of such excavating &c., by the defendant of the said mines &c., of ironstone, and the boring and making by the defendant of the said holes, the said mine of coal became and was flooded, and the plaintiffs were prevented and hindered from working and winning their said mine &c., of coal, and from getting and removing coals therefrom, and that the working and winning of the coal in parts thereof became and was rendered impracticable. And I do find and award &c., that the holes which the defendant bored and made from, through and out of the said mines &c., of ironstone, down to and into the said demised mine &c., of coal, were bored by him for the purpose of conveying, and the same did convey, water from his mines of ironstone into the coal mines of the plaintiff demised by the said indenture of lease; and that the plaintiffs have, by the making of such holes by the defendant, sustained damage to the extent of 100*l*. And I do find, award &c., that the said excavating &c., of the said mines &c., of ironstone so excavated &c., by the defendant as hereinbefore is stated, was (with the exception of the boring by him of the

said holes) done in a workmanlike manner; but that the plaintiffs have thereby (in addition to the damages of 100*l.* caused to them by making of the said holes) sustained damages to the extent of 509*l.* 4*s.* 10*d.*—The arbitrator then proceeded to award, that in the event of the Court being of opinion that the defendant had a right to excavate &c., the said mines &c., of ironstone, but that he had no right to make the said holes, and that the plaintiffs are entitled to recover damages for the making of the said holes: then I do award &c., that the defendant shall pay to the plaintiffs the sum of 100*l.*: and in the event of the Court being of opinion that the defendant had no right either to excavate &c., the said mines &c., of ironstone, or to make the said holes; and that the plaintiffs are entitled to recover damages for such excavating &c., and also for the making the said holes: then I do award &c., that the defendant shall pay to the plaintiff (in lieu of the said sum of 100*l.*), the sum of 609*l.* 4*s.* 11*d.*—The arbitrator then proceeded to find that the defendant, at the time of bringing the action, continued to disturb the plaintiffs as in the declaration alleged; and that the plaintiffs would be unable to work their mine of coal with the same advantage and profit, if the defendant should work the mines of ironstone within sixty-six yards of those parts of the closes under which the mine of coal might remain ungotten, as they would do were the mines of ironstone unworked; but that the mines of ironstone might, without disadvantage or loss of profit to the plaintiffs, be excavated at a distance of sixty-six yards: and that if the Court should be of opinion that the excavating the mines of ironstone is a breach of the covenant in the lease of the 1st November 1844, then that a writ of injunction should issue.

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*J. Addison*, for the plaintiffs.—The question is, whether a covenant for quiet enjoyment extends to a disturbance

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by the act of the covenantor himself, whether rightful or wrongful. The distinction is well established between acts done by the covenantor and acts done by a stranger. As regards the latter, the covenant for quiet enjoyment only extends to *legal* acts, but as regards the former, the covenant is against every act, whether rightful or wrongful. In Com. Dig. "Condition" (G. 12), it is said, "So, if a condition be that it shall be lawful for the lessee to enjoy; if the lessor enters upon him wrongfully, it is a breach; for the intent was that the lessor should not interrupt him: R. 1 Rol. 427 l., 15. R. Cro. Eliz. 544." Again, in Com. Dig. "Covenant" (E. 1), as to what shall be a breach of a covenant for quiet enjoyment without interruption or molestation, it is said, it shall be a breach "If the covenantor himself wrongfully disturbs him. Otherwise, if a stranger interrupts wrongfully, without title." *Andrews v. Paradise* (a) decided, that if a man covenant that he will not interrupt the covenantee in the enjoyment of a close; the erection of a gate which intercepts it is a breach of the covenant, although he had a right to erect it. That case is a direct authority that the covenantor is liable for a disturbance, though the act done by him was of right. The distinction between a covenant against the acts of a particular individual, and a covenant against the acts of all persons was recognised in *Nash v. Palmer* (b). There Lord *Ellenborough*, C. J., said, "The rule has, I think, been correctly stated at the bar, that where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title. And the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest; and therefore

(a) 8 Mod. 319.

(b) 5 M. &amp; Sel. 374.

the law has properly restrained it within its reasonable import, that is, to rightful title. It is, however, different where an individual is named; for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise." *Fowle v. Welsh* (a) is also an authority that where the covenant is against the acts of a person named, it extends to all claims by him whether upon lawful title or otherwise.

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*Phipson* (*J. Brown* with him), for the defendant.—The general proposition of law, as stated by the other side, is not disputed. A simple covenant for quiet enjoyment extends only to lawful acts; but where the covenant is against the acts of the covenantor or third persons therein named, it extends to wrongful as well as rightful acts. The cases on this subject are of two classes: there has been either a wilful act of expulsion, or an entry under a claim of right. Where the covenantor *wilfully* enters, it is of no avail that he does so as of right. In *Andrews v. Paradise* (b), the covenantor had a right to erect the gate which interrupted the enjoyment of the close. In *Nash v. Palmer* (c), the party against whose acts the defendant undertook to indemnify the plaintiff entered under colour of right. Again, in *Fowle v. Welsh* (a), the entry was under a claim of title. Here the defendant is in possession of a quarry above the mine which he demised to the plaintiff, and he works it in the ordinary mode. [*Pollock*, C. B.—Suppose a person demises a set of chambers beneath his own with a covenant for quiet enjoyment; and then does some act of annoyance in his own, which renders the other

(a) 1 B. &amp; C. 29.

(b) 8 Mod. 319.

(c) 5 M. &amp; Sel. 374.



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chambers uninhabitable, would not that be a breach of the covenant?] The defendant had a right to work his quarry to the extreme boundary, and the plaintiffs should have left a barrier to protect themselves from the water. *Humphries v. Brogden* (a) decided that, of common right, the owner of the surface is entitled to support from the subjacent strata; and assuming that the same principle applies here, the proper remedy is by an action on the case. In 2 Wms. Saund. 178 a, note, after stating the general rule, it is said: "It may be observed, that to entitle a party to maintain an action on a covenant for quiet enjoyment, some act of the defendant, or of those against whose acts he covenants, asserting title, must be proved; it would not be sufficient to shew that the defendant disturbed the plaintiff by trespassing, as for instance by sporting on the land." *Lloyd v. Tomkies* (b) is also an authority that the act must be done under an assertion of right. There is no authority to shew that where there is no claim of title, or assertion of right, or interference with the possession, the act complained of is within this covenant. Suppose a demise of a house, and that the lessor afterwards erects near to it chemical works, which emit so disagreeable an effluvia as to annoy the inhabitants of the house, would that be a breach of the covenant? It is not every possible wrong which interferes with the enjoyment that is a breach of this covenant; but there must be either an actual expulsion or an interruption of the enjoyment under a claim of right.

*Addison*, in reply.—The covenant in this case provides for molestation, interruption, or disturbance of any kind; and the arbitrator has found that in consequence of the defendant's acts the working of the plaintiffs' mine has

(a) 12 Q. B. 739.

(b) 1 T. R. 671.

become impracticable. It is equally a breach of the covenant whether the act which caused the interruption was done under a claim of right or not.

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POLLOCK, C. B.—There must be judgment for the plaintiffs. The question is whether the covenant for quiet enjoyment extends to the facts found by the arbitrator. It seems to me that it would require some distinct authority to shew that it did not. The defendant covenants, not only that the lessees shall peaceably and quietly occupy the demised mine, but also that they shall do so without any molestation, interruption, or disturbance whatever from him. Mr. *Phipson* put the case of a person who, having demised a house and entered into such a covenant, did some act on the adjoining land which caused a nuisance to the lessee. It is not necessary to say whether that would be a breach of the covenant: probably not. But here the connection between the two properties, the one being below the other, raises a different consideration. If a lessor demises the stratum below, and covenants that he will do nothing to prevent its quiet enjoyment, he is bound so to use the surface as not to disturb the lessee in his occupation. Here, the arbitrator has found that the defendant caused the plaintiffs great disturbance and interruption in the quiet enjoyment of the subject-matter of the demise.

MARTIN, B.—I am of the same opinion. The defendant has covenanted that the plaintiffs shall enjoy the coal mine without any molestation or interruption from him. Then, the defendant causes a quantity of water to flow into the mine, and also causes the roof to fall in, whereby the working of the mine becomes impracticable. There is no authority that such acts are not a breach of the covenant for quiet enjoyment.

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WATSON, B.—I am of the same opinion. The action is brought on a covenant for quiet enjoyment by which the lessor covenants for his own acts and the acts of those claiming under him. It is clear that the plaintiffs are entitled to recover the 100*l.*, awarded as damage for making the holes. Then, as to the 50*9l.* 4*s.* 10*d.* awarded as damage for excavating the quarry: the arbitrator finds that, by his excavating it, he caused parts of the roof of the demised mine to fall in, and further that the plaintiffs were prevented from working the mine. It seems to me that where a person covenants against his own acts, whether rightful or wrongful, such a disturbance of the occupation of the mine is a molestation and interruption within the meaning of the covenant. Indeed, I cannot conceive any greater. It is not necessary that the covenantor should commit an act of interruption upon the demised premises; if he does something so near to them as to cause them partly to fall down, that is an act by which the lessee ceases to have the quiet enjoyment. On these short grounds I am of opinion that, upon the face of the award, the plaintiffs are entitled to recover both in respect of making the holes and excavating the quarry.

CHANNELL, B.—I am of the same opinion. The plaintiffs seek to recover damages by reason of an alleged breach of the covenant for quiet enjoyment. It is said that the acts done by the defendant are not a breach of that covenant. Certain authorities were cited by Mr. *Addison* for the purpose of shewing that where there is a covenant for quiet enjoyment, as against the covenantor it is immaterial whether the act done is rightful or wrongful; that is, an act which, but for the covenant, might have been rightful, becomes wrongful. Mr. *Phipson* did not dispute the authorities, but argued that they were inapplicable to this case.

I am disposed to think that there may be an act, done by a lessor who covenants against his own acts, which may produce an injury of such a nature as to leave the covenantee to his remedy by action on the case. But looking at the terms of this covenant, and accepting Mr. *Phipson's* admission of the authorities, I am of opinion that the facts found by the arbitrator bring this case within the interpretation which he places on them. If the declaration had simply charged, not the modes by which certain results had been accomplished, but the results themselves, and they had been proved to have been the act of the defendant, the case would have been clearly within the covenant against any molestation or interruption by the lessor himself.

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*Addison* then applied for a writ of injunction, which was granted

Judgment for the plaintiffs and  
 injunction granted.

SUTER v. BURRELL.

Jan. 15.

**ACTION** against the sheriff of Northumberland for not arresting under a ca. sa.—Plea: Not guilty.

The cause was tried before *Watson*, B., at the Northumberland Summer Assizes, 1857, when the plaintiff's counsel, in order to connect the sheriff with the act of the bailiff,

In an action against a sheriff for not arresting under a ca. sa., in order to connect the sheriff with the transaction the bailiff (who had

had not been served with a subpoena duces tecum) proved, that when the defendant went out of office the warrant was sent to the persons who while the defendant was sheriff acted as the London agents, and who were also his attorneys on the record.—*Held*, that notice to them to produce the warrant, after the defendant had gone out of office, was sufficient to entitle the plaintiff to give secondary evidence of its contents.

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I am disposed to think that there may be an act, done by a lessor who covenants against his own acts, which may produce an injury of such a nature as to leave the covenantee to his remedy by action on the case. But looking at the terms of this covenant, and accepting Mr. *Phipson's* admission of the authorities, I am of opinion that the facts found by the arbitrator bring this case within the interpretation which he places on them. If the declaration had simply charged, not the modes by which certain results had been accomplished, but the results themselves, and they had been proved to have been the act of the defendant, the case would have been clearly within the covenant against any molestation or interruption by the lessor himself.

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called for the production of the warrant, in pursuance of a notice for that purpose. The warrant not being produced, the plaintiff's counsel called the bailiff, who proved that when the defendant went out of office he sent the warrant to Messrs. Gray & Armstrong, who acted as the London agents whilst the defendant was sheriff, and who were also his attornies on the record. It was admitted that a notice to the defendant to produce the warrant had been served on Messrs. Gray & Armstrong.

The defendant's counsel objected that the notice to produce the warrant was not sufficient to entitle the plaintiff to give secondary evidence of its contents; but that the bailiff ought to have been served with a subpoena duces tecum to produce it. The learned Judge reserved the point, and a verdict was found for the plaintiff.

*Manisty*, in the following term, obtained a rule nisi to enter a nonsuit, pursuant to the leave reserved, against which

*Edward James and Brett* now shewed cause.—The notice to produce the warrant was sufficient to entitle the plaintiff to give secondary evidence of its contents. By the 3 & 4 Wm. 4, c. 42, s. 20, the sheriff of each county is bound to appoint a deputy in London for the receipt of writs, granting warrants thereon, making returns thereto, &c. Therefore Messrs. Gray & Armstrong were in the same situation as the under-sheriff, for those purposes. In *Taplin v. Atty (a)*, the sheriff's warrant to levy execution had, after the levy, been returned by the bailiff to the under-sheriff, while the sheriff was yet in office; and the bailiff, upon being called as a witness, did not produce it: it was held that proof of notice to the sheriff's attorney to produce it was sufficient to entitle the party to give parol evidence of its contents. That is a distinct authority that

(a) 3 Bing. 164.

notice to the deputy, whilst the sheriff is in office, is sufficient; and it makes no difference that the notice was given after the year of office expired. The defendant cannot refuse to produce the warrant because he held it in another capacity. The plaintiff has used all reasonable efforts to procure the primary evidence. The warrant was traced into the possession of the London agents of the sheriff, and notice was given to produce it. That was sufficient to lay the foundation for secondary evidence, if the Judge was satisfied that the document was in the possession or power of the party required to produce it: *Cole on Ejectment*, p. 167. Moreover, Messrs. Gray & Armstrong are the attornies, on the record, for the defendant.

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*Liddell*, in support of the rule—The notice was not sufficient to lay the foundation for secondary evidence. The bailiff should have been served with a subpoena duces tecum to produce the warrant. Messrs. Gray & Armstrong filled two characters: they were the London agents of the under-sheriff, and the attornies for the defendant. The notice was given after the defendant went out of office, and therefore the case comes within the mischief pointed out by *Best*, C. J., in delivering the judgment of the Court in *Taplin v. Atty (a)*, who says:—"No notice was given to the under-sheriff to produce the warrant, and if it had been placed in his hands after the sheriff had gone out of office our judgment might have been different, for it would be inconvenient, when the sheriff is no longer in office, to compel him to send perhaps across the whole county to apprise the under-sheriff of such a notice; but as he was still in office, and as the under-sheriff is in law identified with him, we think that notice to the sheriff is equivalent to notice to the under-sheriff." *Gibbon v. Coggon (b)* is an authority

(a) 3 Bing. 164.

(b) 2 Camp. 189.



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that Messrs. Gray & Armstrong were not the agents of the defendant for the purpose of receiving this notice.

POLLOCK, C. B.—We (a) are all of opinion that the rule must be discharged.

Rule discharged.

(a) *Pollock, C. B., Martin, B., Watson, B., and Channell, B.*

Jan. 20 & 29.

WHITEHEAD v. PARKS.

By lease, dated 1827, D. demised to W. a dwelling-house and fifteen closes of land, and granted all streams of water that might be found in four of those closes called the Clough, the Moorin Clough, the Brow, and the Marleds, excepting out of the demise all timber and

other trees, &c., mines and minerals, &c., stone, gravel, sand and clay, &c., and all streams of water, except those above granted, then being or thereafter to be found in or upon the premises demised, with power for D. his heirs and assigns, and his and their servants and workmen, from time to time, to enter upon the premises, and to crop, fall, search for and make marketable all or any of the before mentioned articles; to make any clay into bricks or tile on the premises &c.; and to divert or alter the course of any river, brook, spring, or water."—There was a plan annexed to the lease shewing a stream of water on the north side of the demised premises and flowing through their whole extent from west to east. The Clough, the Moorin Clough, the Brow, and the Marleds, were situate on the banks of this stream. There was no other stream on the surface, but certain wells were in existence in those closes, and others were subsequently found.

Held, that the wells and all water in the Clough, the Moorin Clough, the Brow, and the Marleds passed by the grant in question to W., and that neither D. nor his lessees could work the mines so as to cut off the springs in the closes in question.

said coming and flowing to the land, lodges and reservoirs of the plaintiff (alleging special damage) (a).

Pleas (inter alia).—First: Not guilty. Secondly: Not possessed. Thirdly: that the plaintiff was not, by reason of his alleged possession of the land and bleaching-works thereon, entitled to the flow and use of the said streams and springs.

The cause came on for trial before *Willes, J.*, at the Liverpool Spring Assizes, 1856, when it was referred to an arbitrator, who stated a case for the opinion of this Court, (in substance) as follows.—

The action was brought for the alleged abstraction of the water of certain springs, numbered respectively 1, 2, 3, 4, 5, 6, 7, on a plan; whereby the same was prevented from flowing into certain lodges and reservoirs of the plaintiff respectively situate in certain closes of the plaintiff, called “The Marleda,” “The Moorin Clough,” “The Brow,” and “The Clough.”

Before and at the time of the commencement of the action, the plaintiff was possessed of certain land and bleaching-works, and he held and now holds the same under a lease (b)

(a) There was a second count for injury to the plaintiff’s reversionary interest, stating that the land and bleaching-works were in possession of his tenants.

(b) The material parts of this lease (which was to form part of the case) are as follows:—“This indenture made the 7th of April, 1827, between The Right Honorable Edward Earl of Derby of the one part, and Samuel Woodcock, of &c., of the other part: Witnesseth that the said Earl in consideration of the sum of 3,150*l.* by the said S. Woodcock to the said Earl paid at the

delivery hereof, &c., doth demise, and to farm let, unto the said S. Woodcock, his heirs and assigns: All that tenement consisting of a dwelling-house, &c., and the following closes of land, called Round Meadow, Rye Field, Marled Earth, Lowest Field, Middle Field, Croft, The Croft with a garden over the brook, Long Meadow, Back Meadow, Clough, Brow, Moorin Clough, Old Close, The Hey, Pollett Close, Middle Hey, Highest Field, and The Marleds; containing in the whole fifty-one acres, &c., situate in Elton, &c. And also the said

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thereof for three lives, made the 7th April, 1827, between the Earl of Derby of the one part, and one Samuel Woodcock of the other part; and which said lease became vested in the plaintiff, by virtue of an assignment thereof, dated the 6th May, 1844.

The defendant was, and still is, the tenant of the Earl of Derby of certain mines of coal under the said land and bleach-works of the plaintiff. His lease bears date in 1829.

From a period prior to the year 1800, up to and at the time of granting the lease of the 7th April, 1827, the premises now held by the plaintiff thereunder were occupied and used as bleach-works. At the date of the lease a stream of water, called Elton Brook, flowed through the premises on the north side thereof. There were also at that time three lodges or reservoirs of water on the premises. One in the Marleds, called the Top Lodge, which was supplied

Earl doth grant unto the said S. Woodcock, his heirs and assigns, *all streams of water that may be found in the closes of land, called the Clough, the Moorin Clough, the Brow, and the Marleds. Except out of this demise, all timber and other trees, plants, woods, underwoods, mines, minerals, metals, delfs and quarries, and all stone, gravel, sand and clay, and all marl; and all ways and roads for the convenience of the said Earl, his heirs or assigns, or his tenants in Elton aforesaid, through the demised premises, for such purposes as the said Earl, his heirs or assigns, may require; and all streams of water except those above granted, now being or hereafter to be found in or upon the premises demised; with power for the said Earl, his heirs or assigns, and his*

and their servants and workmen, from time to time to enter upon the premises with or without horses and carriages, and to crop, fall, search for and make marketable all or any of the before mentioned articles; to make any clays into bricks or tile on the premises; to stack, bark and burn wood for charcoal; and to carry away and remove the same at pleasure; *and to divert or alter the course of any river, brook, spring, or water.* And also except all rights of free warren, &c."—There was a plan annexed to the lease shewing a stream of water on the north side of the demised premises, and flowing through their whole extent from west to east. The Clough, the Moorin Clough, the Brow, and the Marleds, were situated on the banks of this stream.

with water from the said brook, and which occupied part of the site of, but was smaller than, another lodge in the Marleda. A second lodge was situate in the Moorin Clough, which was called The Middle or Cat-tail Lodge. There was a third lodge situate in the Brow, called the Spring-water Lodge, and which occupied the northerly part of the site of the Lower Lodge.

(The case then proceeded to describe the mode in which, up to the time of granting the lease, the business of bleaching was carried on by means of the water on the premises.)

Before and at the time of granting the lease of the 7th April, 1827, a supply of clear water for the purposes of bleaching was obtained from the springs, numbered respectively 1, 2, 3, 4, 5. Spring No. 1 rose in the Marleda, a little to the east of the Top Lodge. It was a natural spring, and had existed from before the time of living memory. It was embanked round to a height of about three feet, partly by a natural, and partly by an artificial embankment, and the overflow therefrom was conveyed by a trough, laid in an artificial channel, into a wash-pit, within which the spring No. 2 was found, and from whence it overflowed into the Brook.

Spring No. 2 was found in the wash-pit above mentioned, by boring, about fifty years ago.

Spring No. 3 (a) was a natural spring, and was bricked round so as to form a well. It had been in existence in that state for upwards of thirty years. It was a copious spring, and the overflow from it was carried through a covered drain into the covered part of the drain which conveyed the clean water from No. 1 and 2, as above

(a) The corresponding numbers on the plan shewed that this and the following springs arose either in the "Marleds," the "Moorin Clough," the "Brow," or the "Clough."

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described; and it also flowed along the said drain partly under cover.

Spring No. 4 was also a natural spring which had been in existence for thirty or forty years. There was a wash-pit, which was not flagged at the sides but was partly flagged at the bottom, and this spring rose in the bottom of that pit.

Spring No. 5 was also a natural spring, which had been in existence for upwards of thirty years. It arose in the bottom of a wash-pit.

All the waste water from the several springs and lodges flowed into the brook.

(The case then stated that certain alterations were made by the plaintiff in the lodges in the years 1834 and 1839, and that in order that the waste water of the brook might not flow into the "Top Lodge," which was converted into a lodge for clean water, the brook course was diverted.)

Spring No. 6 was found by boring about sixteen years ago. It was close to the old brook course, and an iron pipe was put into the bore-hole into which the water of the spring rose, and over which it flowed into the old brook course, and along the said course into the Lower Lodge.

Spring No. 7 was also found, by boring, in the year 1849; and the overflow from that spring was conveyed in an open channel down the bank of the Lower Lodge into that lodge.

The whole of the said springs were of good quality for the purposes of bleaching, and, until the said springs failed as hereinafter mentioned, the supply afforded by No. 1, 2, 3, 4, 5, even without that from No. 6 and 7, had always been sufficient for the business carried on upon the premises.

In the year 1849 one R. Robinson commenced sinking a shaft for the purpose of working the coal mines under the

plaintiff's premises. After his death in 1850, the sinking of the shaft (which is 138 yards deep) was completed by the defendant. The defendant set the engine to work at the engine-pit in August 1850, and continued to work the coal mines up to the present time. All the water is pumped from the mine at the engine-pit, and the water so pumped is delivered on to the land of the plaintiff by means of a tunnel, at a point two feet eleven inches above the flow of the bleach-works. The water so delivered is strongly impregnated with iron. About the end of the year 1850, or early in 1851, the water of springs No. 2, 3, 6, 7, disappeared; and with the exception of a small and variable flow of water into No. 3, the several springs have been dry ever since. Some time in the year 1852, it was discovered that the water of Springs No. 4, 5, had also disappeared, and these springs respectively have been dry ever since, and the water has failed in the Lower Lodge.

The arbitrator found that the defendant, by sinking the shaft and working the coal mine as above stated, did divert and withdraw the water of and from the said springs numbered respectively 2, 3, 4, 5, 6, 7, and did thereby prevent the water of the said springs respectively from coming and flowing to the said Lower Lodge in the manner hereinbefore described, and caused the water in the said lodge to fail as before stated.

The question for the opinion of the Court is, whether, upon the facts above stated, the plaintiff is in law entitled to maintain this action.

*Monk* (*Manisty* with him), for the plaintiff.—It is found as a fact that at the time the lease of the 7th April, 1827, was granted, these springs were on the demised premises and had been for more than twenty years used for bleaching purposes. The plaintiff claims them under that lease: the

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defendants justify the abstraction of the water under a demise to them of coal mines, by the same lessor, in 1829. It is necessary, therefore, to see what right to water was granted by the lease of the 7th April, 1827, in order to ascertain what was left in the lessor. That lease granted "all streams of water that may be found" in the four closes of land therein named. That means all the streams which may be found during the subsistence of the lease. The language of the reservation, if doubtful, must be construed against the lessor. The lease would have passed all the then existing water without express words for that purpose. A demise of land for a term of years includes everything which is necessary for its enjoyment. The right to water is limited to that found in the four closes; and but for the exception the whole of the water would have passed. The intention was to grant the water of those closes for bleaching purposes, and to reserve to the lessor the water in the other closes. It is true that the lease contains a power for the lessor "to divert or alter the course of any river, brook, spring, or water;" but if that power be construed literally it is void as repugnant to the grant. If the lessor has power to divert the water in any manner he pleases, he may remove it altogether, or return it in a condition unfit for any use. The diversion must be such as to leave the subject-matter of the grant capable of enjoyment: *Harris v. Ryding (a)*. The case finds that the water was abstracted by the defendants, and returned in a state unfit for the purposes of bleaching; therefore, even if the power of diverting is not confined to the excepted streams, it does not justify the abstraction.—Then, as to springs No. 6 and 7: assuming that the words in the lease, "all streams that may be found," do not extend to streams not in existence at the time the lease was

granted, nevertheless, without those words, the plaintiff is entitled to all the water which comes to the surface of the four closes during the term, either by the operation of nature or the act of man: it is the same as if there had only been an exception of the water in certain specified closes.

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*T. Jones* (with whom were *Knowles* and *Atherton*), for the defendant.—The first point is, whether, by virtue of the lease of 1827, the plaintiff is entitled to the waters of the springs in the closes in question against the Earl of Derby, under whom the defendant claims. At the time of the granting of the lease some of the springs in question were known and used as springs. Others have since been discovered. There were also the brook and the lodges. The lease does not in terms grant the springs. There was a stream at the time of the lease to satisfy the words of the demise. The grant of “all streams that may be found” is a grant of the superficial streams, and may include all streams that might thereafter be formed and made to flow into the brook. But the defendant has not diverted any stream from the surface. The lease expressly reserves mines and all streams of water, except those above mentioned and specifically granted, with power to the lessor and his assigns to enter upon the premises and get the minerals and to divert any spring. The lessee therefore took the lease subject to the risk of boring the springs by mining operations. That is the true construction of this lease. Were it otherwise, the interpretation would be contrary to the express words of the reservation. The plaintiff is in the same position as any other persons having water rights which are or may be affected by subterraneous operations. The rights of such persons were defined in *Chasemore v. Richards*(a). [*Martin, B., referred to Northam v. Hurley*(b).]

(a) *Anté*, p. 168.

(b) 1 E. &amp; B. 665.



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It is unreasonable to suppose that Lord Derby intended to exclude himself from mining under these premises, as practically he has if the plaintiff's contention is well founded. *Harris v. Ryding* (a) has no application, because it is not found that the mines were not worked in a reasonable manner.

POLLOCK, C. B.—In the case of *Northam v. Hurley* (b) it was settled that, where rights to water are created under a deed, the Court cannot take into consideration what are the rights which the parties would have had as riparian proprietors or otherwise; but the nature and extent of their interest must be regulated wholly by the deed. Here the defendant is in the same position as Lord Derby, and, as his lessee, could not derogate from that which he had granted. It appears to me that if Lord Derby intended to reserve that which is claimed, he should have done so by expressions shewing that he intended to interfere with the springs under the closes in question. The defendant, however, says that Lord Derby, having granted a certain farm "and all streams of water that may be found" in four closes part thereof, "except out of this demise all mines, minerals, &c., and all streams of water, except those above granted, now being or hereafter to be found in or upon the premises," with power "to divert or alter the course of any river, brook, spring, or water," must be understood to have reserved a power of working the mines reserved, notwithstanding the streams should be interfered with by the mining operations; and that for such interference he and his tenants should not be responsible. If we could collect that, with the reservation of the mines, he reserved all that was necessary or convenient for working the mines, we might so construe the deed. But, here, the terms of

(a) 5 M. & W. 60.

(b) 1 E. & B. 665.

the deed are plain, and Lord Derby could have had no right, after having granted the springs in question to Woodcock and his assigns, to take away such springs in order that his mines might be effectually worked. The arbitrator has found that the defendant has taken water which was within the range of the premises demised, and within which all springs were granted. The plaintiff therefore is entitled to our judgment.

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MARTIN, B.—I am of the same opinion. Lord Derby granted to Woodcock all the water which might be found on the closes in question. Lord Derby cannot derogate from his grant, and the defendant, his lessee, is in the same position. *Northam v. Hurley* (a) decided for the first time what appears to me to be clear, viz., that if, upon a question of water rights, there is an agreement by deed, such deed will regulate the rights of the parties. Now, at the time of the execution of this lease, there was only one stream in the four closes to which I am about to refer. There were several places where water collected, but only one stream in the ordinary acceptance of the term. The Earl demises to Woodcock about fifteen closes of land with “all streams of water that may be found in the closes of land called the Clough, the Moorin Clough, the Brow and the Marleda.” Looking at the surrounding circumstances, I should say that the words do not refer to surface streams, because there were none except Elton Brook on the property. “All streams” means “all water in the closes in question.” The demise is really a demise of the springs. The water to which Woodcock was to be entitled was of the same character as that to which Lord Derby was to be entitled in other parts of the premises in which he reserves to himself “all streams of water except those above granted, now

(a) 1 E. &amp; B. 665.

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being or hereafter to be found in or upon the premises demised," with "power to divert or alter the course of any river, brook, spring, or water." Spring water is, I believe, essential for bleach-works. It is not material to inquire whether Lord Derby and his lessees may or may not be able to get the coal under the land. However that may be, he cannot derogate from his own grant to enable him to do so.

CHANNELL, B.—The whole question turns upon the lease of 1827. The defendant has no greater rights than Lord Derby had. I think that the plaintiff has acquired a right to all the water in the four several closes. The Earl of Derby granted, &c. (His Lordship then read the grant and the reservation). He did not intend with respect to the other closes to except the surface water only, but also all springs other than those before granted. The grant of the water in the four closes is not confined to the surface streams. My brother *Martin* has pointed out that the word "streams" is in the plural, while at the time of the grant there was but one stream in the ordinary meaning of the word in these closes; therefore effect cannot be given to the language without construing it as referring to something different from surface streams. That being so, neither Lord Derby nor his assigns can derogate from his grant.

Judgment for the plaintiff.

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## REGULA GENERALIS.

HILARY TERM, 1858.

Whereas by the Rule of Michaelmas Term, 1855, with respect to indorsements on writs issued under "The Bills of Exchange Act, 1855," it was, amongst other things, ordered that no other claim than a claim on a Bill of Exchange or Promissory Note should be included in writs under the "Summary Procedure on Bills of Exchange Act, 1855."

And whereas it is expedient that the said Rule should be explained and amended. It is hereby ordered, that where a defendant obtains leave to appear according to the said Act, and enters an appearance to any such writ according to the said Rule of Michaelmas Term, 1855, the plaintiff may include in his declaration, together with a count on the Bill of Exchange or Promissory Note (as the case may be), a count upon the consideration, if any, between the plaintiff and defendant, for the Bill of Exchange or Promissory Note, and deliver a particular of demand accordingly.

(Signed)

CAMPBELL.

SAMUEL MARTIN.

A. E. COCKBURN.

R. B. CROWDER.

FRED. POLLOCK.

J. WILLES.

J. T. COLERIDGE.

G. BRAMWELL.

WM. WIGHTMAN.

W. H. WATSON.

W. ERLE.

W. F. CHANNELL.

E. V. WILLIAMS.

J. BARNARD BYLES.

Read in Court Jan. 30, 1858.

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## MEMORANDUM.

In the preceding Vacation the following gentlemen were appointed Her Majesty's Counsel:—*Evelyn Bazalgette*, Esq., of Lincoln's Inn; *John Shapter*, Esq., of Lincoln's Inn; *Samuel Bush Toller*, Esq., of Lincoln's Inn; *Thomas Webb Greene*, Esq., of the Middle Temple; *Francis Henry Goldsmid*, Esq., of Lincoln's Inn; *Richard Paul Amphlett*, Esq., of Lincoln's Inn; and *James Fleming*, Esq., of the Middle Temple.

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#### ARBITRATION.

(1). *Agreement of Reference—Referring back Award after death of one of several Arbitrators.*

By an order of reference an action was referred to the award of twelve persons, six to be named by each party to the action; and it was ordered that in the event of either of the parties disputing the validity of the award, &c., the Court should have power to remit the matters thereby referred or any of them to the reconsideration of the said twelve persons; and in the event of either of the said parties declining to act, or dying before they or he should have made their or his award, the parties might, or if they could not agree, one of the Barons of the Court might appoint fresh arbitrators. After the arbitrators had made an award one of the twelve died. On motion to set aside the award, which was admitted to be bad, *Held*, that the Court had power to remit back the matters referred, to the surviving

eleven and a fresh arbitrator to be appointed in pursuance of the power in the submission. *Lord v. Hawkins*, 55

(2). *Matters in Difference—Mesne Profits—Where Action of Ejectment and all Matters in Difference referred.*

Lands were taken by the defendants, a Railway Company, for the purposes of their railway. On the 27th of June, 1854, the owner of the lands brought ejectment to recover possession. On the 3rd of August the defendants executed a deed poll, under the 77th section of the Lands Clauses Consolidation Act, for the purpose of vesting the lands in themselves. At the trial, on the 8th of August, a verdict was taken for the plaintiff, subject to a reference of the action and all matters in difference between the parties to an arbitrator, who was to ascertain what sum should be paid by the defendants to the plaintiff as the price of, or compensation for the land of the plaintiff, the plaintiff thereby consenting to make and execute a conveyance, &c. The arbitrator made his award and directed that a verdict for the plaintiff should stand, and that a sum of money should be paid by the defendants to the plaintiff as the price of and compensation for the land of the plaintiffs, which the Company, at the time of the making of the order of reference, had taken for the purposes of the railway. The plaintiff having signed judgment, sued out a writ of possession, under which he took possession of the land, and afterwards brought an action for mesne profits. *Held*, that the question of mesne profits was a matter in difference between the parties which appeared by the award to have been disposed

of by the arbitrator. *Smalley v. The Blackburn Railway Company*, 158

(3). *Compulsory reference—Power of Court to amend Particulars after.*

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(4). *Extortion by Arbitrator—Action to recover back excessive Charge for Award.*

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### ATTORNEY.

(1). *Authority of.*

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(2). *Liability of Attorney for Expenses of Witness.*

A survey and valuation of the parish of E. had been made for the purpose of a poor rate: against which certain inhabitants appealed. The defendant who was an attorney and clerk to the parish officers, thinking it advisable that the valuation should be supported by the evidence of

another surveyor, with the authority of the parish officers wrote to the valuer to secure the services of a competent person for that purpose. The valuer communicated with the plaintiff, an architect and surveyor, who, to qualify himself for giving evidence, examined the premises in respect of which the litigation arose, and afterwards gave evidence as to their value. The plaintiff entered his account in his ledger against the parish officers, and sent in his bill to them, but afterwards sued the defendant for the work thus done.—*Held*, that the parish officers, and not the defendant who was merely their agent, were liable to the plaintiff. *Lee v. Everest*, 285

(3). *Liability of Olient for illegal Arrest by Attorney.*

Trespass for false imprisonment. Pleas: Not guilty, and justification under a ca. sa.—Replication, to second plea.—That the ca. sa. was irregularly obtained, and set aside for irregularity. It was proved at the trial that judgment having been entered up against the plaintiff, on a warrant of attorney, for 60*l.* given to the defendant to secure the payment of a debt by instalments of which less than 20*l.* were due, the defendant's attorney caused the plaintiff to be arrested under a ca. sa., indorsed to levy 21*l.* 10*s.* The defendant having been informed that the plaintiff had been arrested by a person who had joined in the warrant of attorney, wrote a letter in answer not denying that such arrest had taken place by her authority. The writ was afterwards set aside by order of a Judge.—*Held*, first, that the replication was proved.—Secondly, that the defendant was liable in trespass for the act of her attorney in improperly causing the plaintiff to

be arrested. (Dubitante, *Bramwell, B.*)—Thirdly, that there was evidence to go to the jury that the defendant had authorized the arrest. *Collett v. Foster*, 256

## ATTORNEY GENERAL.

*Want of Consent of, where necessary—Pleading or staying Proceedings.*

*See* CHELTENHAM IMPROVEMENT ACT, 1852.

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*See* CARRIER.

*Mandatory—Landlord volunteering to do Repairs for Tenant.*

A well was let from year to year, neither landlord nor tenant being bound to repair the steining. The well being out of repair the tenant complained to the defendants, the landlords, who sent in men to repair it. The well was destroyed by the negligence of the workmen employed. An action having been brought by the tenant to recover damages for the injuries sustained by him. *Held*, that the defendants were not necessarily responsible, but that it was a question of fact for the jury what was the nature of the obligation incurred by them by reason of their interference. *Mills v. J. E. Holton, J. Gorham and J. Barnard*, 14

## BANKING COMPANY.

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of a shareholder against whom no judgment has been obtained. *Harris v. The Official Manager of the Royal British Bank*, 535

### BANKRUPTCY.

#### (1). *Act of—Beginning to keep House.*

A trader bought goods to be paid for by bill. A few days after the goods had been delivered the seller called and demanded a return of his goods, and at the same time threatened to have the trader arrested for swindling in taking in the goods when he knew he was in insolvent circumstances. He requested to see the trader who refused to see him. *Held* not sufficient to raise a presumption of a "beginning to keep house with intent to delay a creditor," so as to constitute an act of bankruptcy within the 67th section of the Bankrupt Law Consolidation Act. *Clements and Others, Assignees of Phillips, a Bankrupt, v. M'Kibben*, 62

#### (2). *Act of Bankruptcy—Sale of all the Bankrupt's Property for a Consideration, part of which is an Old Debt.*

A sale by a trader in insolvent circumstances, and on the eve of bankruptcy of his stock in trade and the bulk of his property to one of his creditors, the consideration being in part an old debt, is not *per se* an act of bankruptcy though the effect is to stop the trading. *Bell and Another, Assignees of Fairbairns, a Bankrupt, v. Simpson*, 410

#### (3). *Bankrupt Law Consolidation Act, ss. 211, 214—Deed of Arrangement—Act of Bankruptcy.*

On the 26th of June the plaintiffs,

who were traders, petitioned the Court of Bankruptcy for protection, under the 211th section of the Bankrupt Law Consolidation Act. They filed an account of debts, and made a proposal according to s. 214. At an adjourned meeting on the 6th of August, the plaintiffs did not attend, and neither the proposal nor any modification of it was accepted, whereupon the meeting was adjourned to the public Court and the plaintiffs were adjudged bankrupts under s. 223. The adjudication was not founded on the petition of a creditor, nor was the plaintiff's petition dismissed. On the said 26th of June the defendant was indebted to the plaintiffs. On the 6th of July the plaintiffs assigned this debt to Messrs. D., and gave notice thereof to the defendant. Messrs. D. had at the time of the assignment of the debt to them notice of the petition for arrangement.—*Held*: First, that the filing the petition for arrangement was not an act of bankruptcy; that petition never having been actually dismissed, and no petition for an adjudication of bankruptcy having been filed within two months, in pursuance of s. 76. Secondly, that where a trader is adjudicated bankrupt under the 223rd section without the filing of a petition by a creditor, the bankruptcy has no relation back to any act done by the bankrupt prior to the adjudication. Thirdly, that, for the reasons above mentioned, the plaintiffs were entitled to recover the debt in question, as trustees for Messrs. D., notwithstanding the bankruptcy. *Monk and Another v. Sharp*, 540

#### (4). *Bankrupt Law Consolidation Act, s. 230—Composition after Bankruptcy.*

In order to render a composition

after bankruptcy, made under the 230th section of the Bankrupt Law Consolidation Act, 1849, and accepted by nine-tenths in number and value of the creditors, binding on those creditors who have not executed it, the offer of composition must be made to all the creditors, and not to those only who execute the deed.

*Semble*, that the offer must be of a composition by a money payment, and not by bills of exchange. *Taylor v. Pearce*, 36

## BILLS OF EXCHANGE.

(1). *Acceptance—whether qualified by Memorandum.*

Upon a bill dated September 8, 1856, drawn on B. & Co., payable in London at four months after date, an acceptance was written as follows: "Accepted. Payable at Messrs. Overend, Gurney & Co., London. No. 1756. Due 11 December 1856. B. & Co." The words before the signature were written in red ink and in a hand different from the signature.—*Held*, that if it was a question of law the bill must be taken to have been accepted according to its tenor; and that if it was a question of fact, there was evidence that the words "due 11 December, 1856" were not intended to qualify the acceptance. *Fanshawe v. Peet, Public Officer, &c.*, 1

(2). *Foreign Bill—Stamp before Presenting for Acceptance—17 & 18 Vict. c. 83.*

A bill drawn and indorsed at Quebec was transmitted by post to the indorsee at Liverpool, and presented by him to the drawee, who resided in England, for acceptance. *Held*, that the 17 & 18 Vict. c. 83, did not render it necessary for the

indorsee to affix a stamp on such bill before presenting it for acceptance. *Sharples and Others v. Rickard*, 57

## BILL OF SALE.

17 & 18 Vict. c. 36, s. 1—*Residence of Attesting Witness.*

Under the 17 & 18 Vict. c. 36, s. 1, which requires to be filed an affidavit of the description of the *residence* of every attesting witness to a bill of sale, it is a sufficient compliance with the statute if an attorney's clerk is described as of the office or place of business of his employers though he sleeps elsewhere. *Attenborough v. Thompson*, 559

## BOROUGH ENGLISH.

*Custom of Descent—Construction of—Collaterals.*

In ejectment for copyhold premises, the plaintiff claimed as customary heir in Borough English of E. M., who purchased the premises in 1772. Upon the death of E. M. in 1812, the premises descended to his two infant grand-daughters, as co-parceners. One of them died unmarried and was succeeded in her moiety by her sister who, in 1836, married the defendant. She died in 1838, leaving one son, to whom the premises descended, and who died in 1854, without issue, and was the person last seised. It was proved that lands in the manor descended lineally to the youngest son of the person last seised, *ad infinitum*, and if no son to the daughters as co-parceners; if no lineal heirs, to the youngest brother of the person last seised, and to the youngest of such youngest brother; and if the youngest brother died without issue, to the next youngest brother; and if no brother then among the sisters as parceners. There was also an entry

of descent and admission of the youngest son of an uncle, and of the youngest sons respectively of two sisters, heirs of the person last seised. The plaintiff was the youngest son of the youngest brother of E. M. the purchaser.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the custom did not extend to so remote a collateral relation as the plaintiff: Per *Coleridge, J., Wightman, J., Oresswell, J., Crompton, J. (Cockburn, O. J., Erle, J., and Williams, J., dissentientibus.)*—Also that the Inheritance Act, 3 & 4 Wm. 4, c. 106, s. 2, did not affect the custom of descent in the manor. *Muggleton v. Joseph Barnett and Another,* 658

#### BROKER.

*Custom of Brokers.*

*See CONTRACT, (1).*

#### CANAL.

*Navigation.*—"Using Water for the Purposes of Maintaining."

By a Canal Act, the defendants were bound to make a weir at a particular part of the canal for the purpose of discharging all superfluous water into a reservoir for the benefit of premises occupied by the plaintiffs. The defendants in compliance with the requirements of the Act, erected the weir above the seventh lock. In 1844 more water was required for the navigation below the seventh lock than passed through the seventh lock when the sluices were opened for the passage of boats through the lock. The defendants to supply the deficiency let water down from above the seventh lock, to maintain the water at such level as was required for the navigation below it. The plaintiffs then filed a

bill in equity to restrain them from so letting down the water. The suit was compromised by an indenture which provided "that the defendants might take and use, whenever they should think it necessary or expedient for maintaining the navigation of the canal below the seventh lock, so much of the water of the canal as they should consider necessary or expedient for that purpose, subject to a weekly rent of 10*l.* for each and any week or part of a week in which the water above the seventh lock should be taken or used by the defendants for the purposes above mentioned."—On two occasions boats, having passed through the seventh lock, sank; in order to raise them the defendants emptied the lock and the part of the canal immediately below the seventh lock and then having emptied the boats, refilled the canal between the sixth and seventh locks by opening the sluices and letting in water from above. On another occasion, the water having been let out of the canal between the seventh and sixth locks, for the purpose of enabling the defendants to get at the sixth lock to repair it, the defendants afterwards refilled that part of the canal by letting water down from above the seventh lock.

*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the using the water to refill the canal on the occasion of the boats having been sunk was not taking or using the water "for the purpose of maintaining the navigation of the canal below the seventh lock."

*Held*, also (reversing the judgment of the Court of Exchequer), that the using the water to refill the canal on the occasion of the repairs was a taking or using the water "for the purpose of maintaining the navigation of the canal below the seventh

lock." *Llewellyn and Others v. The Company of Proprietors of the Swansea Canal Navigation*, 509

### CANAL COMPANY.

*Drawbridge to carry Highway over Canal.—Insufficiency of Bridge.—Liability of Company if Persons fall into Canal—though Bridge opened by Boatman—Duty as to Lighting and Watching Bridge.*

Certain undertakers of a navigation being incorporated for the purpose of making a canal, and empowered by 28 Geo. 2, c. viii., to take tolls to their own use and behoof; were authorized "to make such and so many bridges as and where they should think requisite and convenient: and to amend, heighten or alter any bridges, and to turn or alter any highways in, through, upon or near the rivers, cuts or canals, as may in any ways hinder the navigation or passage thereon." The Company made a cut through an ancient public highway near St. Helens, which was then a small village, and carried the highway over the cut so made by a swivel bridge. By a subsequent Act, 11 Geo. 4, c. 1, s. 1, to consolidate and amend the former Act; it was recited "that the navigation, cut or canal, and other the works authorized to be made by the recited Act, have been long since made and completed; and by section 48, the Company were empowered to maintain the canal, bridges, &c. By 11 Geo. 4, c. 1, s. 124, all persons were to have free liberty, with boats to navigate the said canal for the purpose of conveying any goods, &c. By sect. 141, penalties were imposed on persons leaving open draw-bridges, &c., after boats had passed. A boatman having opened the swivel bridge to allow his boat to pass through, a person who was

coming along the road walked into the water just as the boat was coming up to the bridge and was drowned. It appeared that when the bridge was open the end of the highway abutting on the canal was wholly unfenced. Two lamps had formerly been kept burning, of which one had been removed and the other was out of repair. The jury found that the deceased was drowned by reason of the neglect of reasonable precautions on the part of the canal Company, without any negligence on his own part.—*Held*: First, that the defendants having a beneficial interest in the tolls were liable to an action, as any other proprietors of private property would be, for a nuisance arising from it.

Secondly, that the bridge at the time of the accident was in the possession of the defendants, and that the action was therefore properly brought against them and not against the boatman.

*Quære*, whether the Company had power to erect a swivel bridge to carry the highway, intersected by their works, over the canal, but, assuming that they had such power:

Per *Pollock*, C. B., and *Martin*, B., the recital in the 11 Geo. 4, c. 1, was not a legislative declaration that the bridge was sufficient at the time of the passing of the Act.

*Held*, further, that, whether or not the bridge was sufficient at the time it was built, the Company were bound to maintain a bridge sufficient with reference to present state of circumstances; and that the jury were warranted in finding a bridge to be insufficient which, when open, left an unfenced gulf in the highway into which a person passing along the road without any fault of his own was liable to fall.

*Held* also that, under such circumstances, the representative of a

person killed by falling into the canal while passing along the highway was entitled, under Lord Campbell's Act, to maintain an action against the defendants. *Anne Manley, Administratrix of Thomas Manley, v. The St. Helens Canal and Railway Company*, 840

### CARRIER.

- (1). *Contract with—Liability of Railway Company forwarding Goods by Steamer and other lines—whether Ultra Vires.*

A parcel was delivered at Penzance, to the West Cornwall Railway Company, addressed to a person at Wolverhampton, "per first steamer from Hayle." The Company's railway only extends from Penzance to Truro; but their practice is to send goods for Bristol, or places above it, to a sea port called Hayle, and there deliver them to the steam-boats; and to send parcels for Bristol, or places above it to Truro, and there deliver them to other carriers, who carry them from Truro to Plymouth (for which distance there is no railway), and from Plymouth they are sent by railway to Wolverhampton. The Company carried the parcel by their railway to Hayle, where they delivered it to a steam-boat, by which it was conveyed to Bristol and from thence by railway to Wolverhampton. The goods in the parcel having been damaged *after* the delivery to the steam-boat.—*Held*, that, under these circumstances, a jury might infer a contract by the Company, as common carriers, to carry the whole distance from Penzance to Wolverhampton; and, consequently, that they were liable for the damage to the goods.

Also, that it is not *ultra vires* for the Company to carry beyond their own line by sea or by coach. *Cusan-*

*dra Wilby v. The West Cornwall Railway Company*, 703

- (2). *Railway and Canal Traffic Act, Conditions—Reasonableness of—Construction of—Carriage, of Live Stock.*

The plaintiff brought three horses to the cattle station of the defendants' railway at Liverpool to be forwarded by a cattle truck to York. The defendants' servant provided a truck for the purpose, which, to all external appearance, and so far as the servant knew, was sufficient for the purpose. The plaintiff signed a ticket, which contained the following memorandum:—"This ticket is issued subject to the owner's undertaking all risks of conveyance, loading and unloading whatsoever; as the Company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." The truck proved (as the fact was) to be insufficient for the carriage of the horses; and a hole was made in the bottom of it on the journey, by which the horses were injured. Twopence a mile for hire was charged, being the regular charge for conveyance in open trucks, under tickets in the above form, from the cattle station. Fourpence per mile was the charge for horses forwarded from the passenger station in "horse boxes," under similar tickets.

*Held*: First, that the condition was reasonable: secondly, that it protected the defendants from liability in respect of the defect in the truck. *M Manus v. The Lancashire and Yorkshire Railway Company*, 693

- (3). *Duty after Refusal of Consignee to Accept Goods.*

Where goods are tendered by a

carrier to the consignee who refuses to pay the carriage, whereupon the carrier refuses to deliver the goods, it is the duty of the carrier to retain the goods at their place of destination, at least for a reasonable time, and during that time to await any directions from, if not to communicate with the consignee: So held Per *Pollock*, C. B., *Martin*, B., and *Channell*, B.; *Bramwell*, B., dissentiente.

The plaintiff delivered in London, to the defendants, a railway Company, a parcel directed to the plaintiff's agent at Plymouth. The defendants' railway terminates at Bristol from whence they forwarded the parcel to Plymouth by the South Devon Railway. The parcel was tendered by a servant of that Company to the consignee at Plymouth who refused to pay the amount demanded for carriage, whereupon the servant took the parcel away. The next day the consignee went to the office of the South Devon Railway and demanded the parcel and tendered the amount of carriage, when he was told that the parcel had been returned to London, but though he made repeated applications at the office in London, the parcel never was delivered. The jury having found that the tender was made within a reasonable time and that the parcel was sent back to London before a reasonable time had elapsed. *Held*: Per *Pollock*, C. B., *Martin*, B., and *Channell*, B., that the defendants were responsible for the act of the South Devon Company, and that the sending the parcel to London at the time they did, followed by the nondelivery of it to the plaintiff, upon or subsequent to the several applications, afforded sufficient evidence of a breach of duty by the defendants in not taking care of the parcel for the plaintiff, even

supposing their duty *qua* carriers ended with the tender of the goods. *Bramwell*, B., dissentiente.

Per *Bramwell*, B., that assuming the act of the South Devon Railway Company was the defendants' act, the defendants were not responsible, inasmuch as they had performed their duty by carrying and tendering the parcel, and that upon the refusal of the consignee to receive it, the defendants had a right to send it back to London. Also that the defendants were not responsible for the act of the South Devon Railway Company. *Crouch v. The Great Western Railway Company*, 491

(4). *Duty of after Refusal of Consignee to Accept Goods—Liability for Damage arising from Imperfect Packing.*

Where goods have been tendered by a carrier to a consignee and refused by him, there is no rule of law that the carrier must give notice of such refusal to the consignor: he is only bound to do what is reasonable.

*Semble*, that whether the circumstances of the case make it reasonable that the carrier should give such notice, is a question for the jury.

A carrier is not responsible for leakage arising from an imperfection in the bung of a cask entrusted to him to be carried, and not caused by any negligence or omission on his part. *Hudson and Others v. Baxendale and Others*, 575

CERTIORARI.

*To Remove Cause from County Court—Practice.*

On an application by a defendant for a certiorari to remove from a County Court a cause in which the demand is over 20*l.*, the Court does not make it a condition that the

defendant, if successful, shall have no more costs than would have been allowed in the County Court. *Ex parte The Great Western Railway Company*, 557

#### CHELTENHAM IMPROVEMENT ACT, 1852.

*Action for Penalty against Party Acting as Commissioner not being duly Qualified — Party Grieved — Consent of Attorney General — Staying Proceedings.*

A declaration, in a *qui tam* action, stated that the plaintiff and defendant were candidates for the office of Commissioner under the Cheltenham Improvement Act, 1852: that the plaintiff would have been elected, but that the majority of votes was in favour of the defendant, who was thereupon elected and acted as such Commissioner without being duly qualified: whereby the plaintiff was aggrieved as a ratepayer, voter, and resident within the borough, and also as such candidate. The Cheltenham Improvement Act, 1852, incorporates section 15 of the Commissioners Clauses Act, 1847, which enacts that every person who shall act as a Commissioner without being duly qualified shall "be liable to a penalty of 50*l.*, and such penalty may be recovered by any person." The Cheltenham Improvement Act, 1852, also incorporates section 138 of the Public Health Act, 1848, which enacts that no proceedings for the recovery of any penalty under that Act shall be taken "by any person other than by a party grieved, or the Local Board of Health in whose district the offence is committed, without the consent of the Attorney General; and if the application of the penalty be not otherwise provided for, one-half thereof

shall go to the informer and the remainder to the Local Board of Health." The cause was tried and a verdict found for the plaintiff.

*Held*: First, that the plaintiff was not a "party grieved" by the defendant acting as such Commissioner.

Secondly, that the declaration was not authorized by section 15 of the Commissioners Clauses Act, 1847, and, under section 138 of the Public Health Act, it was bad in arrest of judgment, inasmuch as (the plaintiff not being a party grieved) it ought to have alleged the consent of the Attorney General.

Thirdly, that although the want of the consent of the Attorney General was an objection which might be taken by plea or demurrer, it was also a ground for staying the proceedings after trial. *Hollis v. Marshall*, 755

#### CHAPELRY, DISTRICT.

*Fees for Christenings, &c., in.*

*See* CHURCH BUILDING ACTS.

#### CHARTER-PARTY.

*See* SHIPPING.

#### CHURCH BUILDING ACTS.

*Division of Parishes—District Chapelry—Who is entitled to Fees arising at Chapel.*

In the year 1810, a chapel was purchased for the purpose of being consecrated as a chapel of ease in the parish of A. The chapel was consecrated under the provisions of a deed, dated the 25th August, 1810, by which the parish clerk and sexton were to be entitled to the fees for christenings, burials and marriages in the chapel and cemetery thereof,

as if they had taken place in the mother church. By an order of her Majesty in council, of the 2nd August, 1853, the chapel was created a district chapelry under the 16th section of the 59 Geo. 3, c. 134. By the 10th section of that Act, when any parish shall be divided under the provisions of the 58 Geo. 3, c. 45, or this Act, all fees belonging to the parish clerk or sexton respectively of any such parish, which shall thereafter arise "in any district or division of any parish divided" under the provisions of the 58 Geo. 3, c. 45, shall belong to and be recoverable by the clerks and sextons of each of the divisions of the parish to which they shall be assigned. The plaintiff, who was clerk and sexton of the parish of A., having brought an action for money had and received, against the defendant, the clerk and sexton of the chapel, for the fees received by him for christenings, burials, and marriages in the chapel.—*Held*: First, that the action for money had and received would lie for these fees.

Secondly: That this being a "district chapelry," was not within the operation of the 10th section of the 59 Geo. 3, c. 134, and therefore that the plaintiff, as clerk and sexton of the parish, was entitled to the fees arising at the chapel. *Roberts v. Aulton*, 432

## COMMON LAW PROCEDURE ACT, 1854.

### (1). *Sect. 32—Error on Special Case.*

By the 32nd section of the Common Law Procedure Act, 1854, error may be brought on the judgment of the Court on a special case in favour of the defendant, notwithstanding that a judgment of nolle prosequi has been entered up in pursuance of a

power to that effect contained in the special case. *Llewellyn v. Proprietors of the Swansea Canal Navigation*, 516

### (2). *Sect. 50—Production of Documents.*

An application, under the 50th section of the Common Law Procedure Act, 1854, for an order that the opposite party answer on affidavit, stating what documents he has in his possession relating to the matters in dispute, &c., will not be granted where it is not shewn that such documents would be evidence for the applicant.

*Semble*, that it is necessary to shew that the documents exist, or at least to identify the particular documents asked for. *Thompson and Others v. Robson and Others*, 412

### (3). *Sect. 51—(a) Interrogatories.*

In an action by the drawer against A. and B., acceptors of a bill of exchange, A. pleaded that the bill was accepted by B. without his knowledge and in fraud of A., with the knowledge of the plaintiff. The plaintiff sought to exhibit interrogatories to A. as to whether there had ever been a partnership between him and B., and if so, as to the business and the particular terms of the partnership. The application was supported by the common affidavits only.—*Held*, that such questions were too large.

*Semble*, that the inquiry should have been limited to a specific time and place, or to the specific facts from which a partnership might be inferred. *Robson v. Crawley and Cook*, 766

### (b) *By Plaintiff in Ejectment.*

A plaintiff in ejectment, who claims



as heir at law, has no right, under the 51st section of the Common Law Procedure Act, 1854, to interrogate the person in possession of the land as to what his title is. *Horton v. Bott and Another*, 249

(4). *Sect. 82—Injunction—Practice.*

An injunction had been obtained restraining the defendants from carrying on certain works so as to be a nuisance to the plaintiffs. Upon a motion for the costs of a rule for an attachment for a breach of it.—*Held*, that the injunction was a continuing injunction, and that it was not necessary to reserve to the plaintiffs leave to renew the motion for an attachment in case of any future breach. *De La Rue and Others v. Fortescue and Others*, 324

(5). *Sect. 83—Equitable Defence.*

To an action for money lent (the defendant being under terms of trying at the ensuing sittings), the Court refused to allow him to plead, as a defence on equitable grounds, the following pleas:—First, as to 10,000*l.*, parcel, &c.; that the claim of the plaintiffs was in respect of monies advanced by the plaintiffs to the defendant upon security of goods consigned by the defendant to the plaintiffs: that at the time of such advancing it was agreed between the plaintiffs and defendant, that the plaintiffs should cause the goods so consigned to be sold on account of the defendant for the best prices which could be got for the same, and out of the proceeds retain the amount of the monies so advanced: that the plaintiffs might have sold the goods for prices more than sufficient to reimburse them the monies so advanced, but the plaintiffs wrongfully and in violation of the agree-

ment sold the goods for prices less than the best prices which might have been got for the same, and by reason of such wrongful act the plaintiffs were prevented from reimbursing themselves the amount [of the monies so advanced out of the proceeds of the sales.—Secondly, as to the sum of 5,400*l.*, parcel, &c., that the defendant consigned to the plaintiffs divers goods, to be by the plaintiffs sold at New York for certain commission to the plaintiffs on that behalf, at prices not less than the best market price: that the plaintiffs not regarding their duty in that behalf wrongfully sold the goods for prices less than the best market price, whereby the defendant sustained losses amounting to 5,400*l.*: that afterwards it was agreed between the plaintiffs and defendant that they should set off the amount of such losses against so much money as might be due from the defendant to the plaintiffs: that the amount of such losses is equal to the said sum of 5,400*l.* parcel, &c., which was due from the defendant to the plaintiffs: that the defendant has always been ready and willing to set off the amount of such losses against the said sum of 5,400*l.* parcel, &c.

*Quere*: Whether the subject-matter of the pleas afforded any defence on equitable grounds. *Atterbury and Others v. Jarvie*, 114

(6). *Sect. 85—Replication on Equitable Grounds.*

To a declaration on a policy of insurance on the life of H., conditioned that if H. went out of Europe all claim to any interest in the funds of the society should cease, with a proviso that H. should be at liberty to visit Tangiers, or any other port within the Mediterranean; the defendants pleaded that H. departed

beyond the limits of Europe otherwise than by visiting Tangiers or any other port within the Mediterranean. The Court refused to allow the plaintiffs to plead as a replication on equitable grounds, that at the time of the making of the policy it was expressly stipulated that the policy should not be vitiated by reason that H. visited ports and places out of Europe; and that the plaintiffs entered into the policy on the terms of such stipulation. *Reis and Another v. The Scottish Equitable Life Assurance Society*, 19

#### COMMISSIONERS CLAUSES ACT (SECT. 15).

*See* CHELTENHAM IMPROVEMENT  
ACT.

#### COMPANIES CLAUSES CON- SOLIDATION ACT, 1845.

*Scire Facias against Shareholder—  
Plea.*

To a declaration in scire facias against a shareholder of a railway Company, the defendant pleaded, for defence on equitable grounds.—That he was requested by the plaintiff to become a transferee of shares in the Company, as the nominee of E. and M. and for their benefit and not for the defendant's benefit, and upon the representation of the plaintiff that if the defendant would become such transferee he should incur no responsibility or liability whatever in respect of such shares: that the defendant relying upon the said representation did become a transferee of the shares in the declaration mentioned, as such nominee of E. and M. and for their benefit and not for the defendant's benefit: that the

defendant was induced by such representation, and not otherwise, to become, and in consequence thereof became, such transferee of the shares: that the defendant never had any interest in the shares, or in the Company, except as such nominee: that he never derived any profit, benefit, or advantage whatsoever from the shares or the Company: that the Company never commenced the railway, and the scheme had been and is entirely abandoned: that the plaintiff knew the circumstances under which the defendant became such transferee, and stood by and suffered and permitted the defendant to become such transferee upon the said representation, and he is now unjustly and inequitably and contrary to the said representation, and in fraud thereof, seeking to charge the defendant and make him responsible and liable as a shareholder of the Company to him, the plaintiff.—*Held*, on demurrer, that the plea afforded no equitable or legal defence. *Bill v. Richards*, 311

#### COMPANIES CLAUSES CON- SOLIDATION ACT (SCOT- LAND), 1845.

*Transfer of Shares by Will.*

*See* REVENUE, (3).

#### COMPOSITION.

*See* BANKRUPTCY, (3), (4).

#### CONSIDERATION.

*Sufficiency of—Forbearing to press  
for immediate Payment.*

*See* GUARANTEE.

## CONTRACT.

*See GOODS SOLD.  
SHIPPING.*(1). *Evidence to explain Usage of Trade.*

The defendants, London merchants, employed a broker at Liverpool to purchase some wool. The broker negotiated a sale by the plaintiff to the defendants of certain bales deliverable at Odessa, "the names of the vessels to be declared as soon as the wools were shipped." In this transaction the broker acted for both plaintiff and defendants. By the custom of Liverpool, where a contract contained a stipulation that notice of an event should be given by the vendor to the vendee, it was usual for the vendor to give the notice to the broker who communicated it to the vendee.—*Held*, in the Exchequer Chamber, affirming the decision of the Court of Exchequer, that the defendants were bound by such usage, and therefore that a notice by the plaintiff to the broker of the names of the vessels on which the wools were shipped was a performance of that stipulation, although the broker omitted to communicate them to the defendants. *Graves v. Legg and Others*, 210

(2). *For Sale of Goods of fair average Quality—Evidence to explain Contract.*

The plaintiff sold to the defendant, "deliverable in London, ex 'Ion,' from Savannah, 400 loads of pitch pine timber, at &c., the timber warranted of fair average quality, to be taken of fair average of the cargo." Evidence was given that pitch pine timber is an article which comes from

several parts in Central America, and that pitch pine timber from Darien has more heart in it, being better butted and with fewer holes than that from Savannah.—*Held*, that the evidence was admissible to explain the contract, and that upon this evidence the contract must be construed as for timber of a fair average of Savannah pitch pine timber. *Jones and Another v. Clarke*, 725

(3). *For Works.*

*See COVENANT*, (2).

(4). *Dissolution of.*

*See SERVANT.*

(5). *Plea of Licence to Action for Breach.*

Leave and licence cannot be pleaded to a breach of contract; but the defendant must shew an exoneration or discharge. *Dobson and Another v. Espie*, 79

## CONTRIBUTION.

*Amongst Partners borrowing Money for the Purposes of the Partnership.*

The plaintiff and defendant were shareholders in a Joint Stock Mining Company. Money being required to work the mine, T., who was also a shareholder, applied to a bank for an advance of 500*l.*, which they consented to make on the security of the joint promissory note of the plaintiff, defendant, and T. The note was given and the money advanced, and applied to the purposes of the mine. The plaintiff having been compelled to pay more than his share of the note sued the defendant for contribution.—*Held*, that this was not a

partnership transaction, and therefore that the action was maintainable. *Sedgwick v. Daniell*, 319

## CONVICTION.

See SERVANT.

VAGRANT ACT.

## COSTS.

- (1). *In Action against Officer of County Court.*

See COUNTY COURT.

- (2). *Order for, in Action on Judgment.*

See PRACTICE, (4).

- (3). *Signing Judgment for.*

See PRACTICE, (3).

## COUNTERMAND OF EXECUTION.

See EXECUTION.

## COUNTY COURT.

- (1). *Jurisdiction of—Malicious Prosecution—Prohibition.*

The plaintiff sought to recover in a County Court "17l. 12s. 6d., being for monies paid, for loss of time and attendance before the magistrates, upon a complaint and information of W. on behalf of the defendants." It appeared that the plaintiff having been summoned before the magistrates for riding in a railway carriage without having paid his fare, the summons was dismissed with costs, and the action was brought to recover the expenses occasioned by such summons. On motion to set aside an order for a prohibition made by a Judge at Chambers,—*Held*,

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that the plaintiff was in substance a plaintiff for a malicious prosecution, and that therefore the order for the prohibition was properly made. *In the matter of a Plaintiff in the County Court of Staffordshire, between Charles Hunt, Plaintiff, and the North Staffordshire Railway Company, Defendants*, 451

- (2). *Interpleader—Appeal—19 & 20 Vict. c. 108.*

Under 19 & 20 Vict. c. 108, s. 68, an appeal from the decision of a County Court in proceedings in interpleader, lies where the value of the goods claimed against the execution creditor exceeds 20l., though the execution is for a sum less than 20l.: and the claimant, to prevent the goods from being sold, has paid such sum. *In the matter of a Plaintiff and Appeal from the County Court of Sussex in a Plaintiff wherein Vallance and Others were Plaintiffs; J. L. Nash, Defendant, and Edmund Edmonds, interpleader Claimant*, 712

- (3). *Removal of Cause from.*

See CERTIORARI.

- (4). *Trespass against Bailiff after Adjudication on Interpleader—Costs.*

Upon an interpleader summons under 9 & 10 Vict. c. 95, s. 118, the judge of the County Court had decided that the goods seized were the goods of the claimant, but no complaint had been made before him as to the breaking and entering the house of the claimant. The claimant afterwards brought an action against the bailiff of the County Court for breaking and entering his house and taking his goods, under colour of a warrant of execution, and recovered damages; whereupon the bailiff applied for a rule to stay the proceedings, upon the ground that a claim

had already been made and adjudicated upon in respect of the same cause of action: the Court refused to interfere. (See *Mercer v. Stanbury*, p. 155, note).

*Semble*: Per *Bramwell*, B., that under the section in question the County Court judge has no power to adjudicate as to the trespass. *Christopher Charles Foster v. Pritchard and Whitroe*, 151

- (5). *Costs in Action against Officer*—  
19 & 20 Vict. c. 108, s. 2—*Acts*  
“done under” 9 & 10 Vict. c. 95.

The plaintiff having recovered only 10*l.* damages the Judge refused to certify for costs. After the action had been commenced and before trial, the 139th section of the 9 & 10 Vict. c. 95, which deprived a plaintiff of costs, in an action in a superior Court against an officer of a County Court in respect of any grievance committed under colour of the process of that Court, where the jury should not find more than 20*l.* damages, unless the Judge should certify, was with other clauses of the same statute repealed, “except as to acts done under them,” by 19 & 20 Vict. c. 108, s. 2.—*Held*, that the latter Act did not alter the rights of the parties as to costs. *Foster v. Pritchard*, 151

- (6). *Metropolitan—Jurisdiction of*—  
19 & 20 Vict. c. 108, s. 18.

By 19 & 20 Vict. c. 108, s. 18, “where a plaintiff shall dwell or carry on business in the district of the Bloomsbury County Court (or other Metropolitan County Courts), and the defendant shall dwell or carry on business within the district of any of the said Courts, the summons may issue and be served either in the district in which the plaintiff

shall dwell or carry on business, or in the district in which the defendant shall dwell or carry on business.” On the 22nd of September the plaintiff took lodgings and went to reside within the Bloomsbury district, and on the 23rd a summons issued from the Bloomsbury County Court, in respect of a cause of action which had arisen in the Marylebone district, where the defendant resided. The defendant objected to the jurisdiction, but upon hearing the evidence the County Court judge decided that the plaintiff dwelt within the district of the Bloomsbury County Court. On a motion for a prohibition,—*Held*: First, that the plaintiff did dwell within the Bloomsbury district; and, therefore, that the judge had jurisdiction. Secondly: That it was not material that the plaintiff had taken the lodging for the express purpose of being enabled to sue in that district.

*Quære*: Per *Martin*, B., whether, the County Court judge having decided the question of the plaintiff's residence after fully hearing the evidence, the Court could review his decision. *Massey v. Burton*, 597

## COVENANT.

- (1). *Whether Assigns bound by—*  
*Pleading—Set-off of Damages.*

A declaration stated that, by indenture, A. in consideration of the rents and covenants on the part and behalf of B., his executors, administrators and assigns, to be paid, done and performed, demised to B., his executors, administrators and assigns, a certain messuage and lands for a term of sixty-three years; with liberty to B., his executors, administrators and assigns, to make any erections or buildings on any part of the premises. B. for himself, his

heirs, executors and administrators (not saying assigns), covenanted that he, his heirs, executors, administrators or assigns, would pay the rent reserved; and that he, his executors or administrators, would repair the messuage and farm, outhouses, barns, stables and all other erections and buildings which should or might be thereafter erected during the term on the demised premises; and the same being so repaired, that B., his executors, administrators and assigns would at the end of the term yield up. The declaration then stated that the interest of B. in the demised premises, by assignment, vested in the defendants; and that the plaintiff became seised of the reversion, subject to the said term. First breach: that the defendants did not repair the messuage, &c., and other buildings which were during the term built on the demised premises. Second breach: that the defendants yielded up to the plaintiff the premises out of repair.—Second plea: to the breaches, on equitable grounds. That while the defendants were possessed of the demised premises, by indenture they demised them to the plaintiff for a term, less by thirty days than their own term: that the plaintiff covenanted to repair and yield up in repair, the defendants finding certain timber and iron work. The plea then alleged that the want of repair complained of by the plaintiff, was caused by his default and was a breach of his covenant; and that the defendants were ready to find timber and iron work: and that they are entitled to recover from the plaintiff the same amount of damages as he sought to recover from them. The plea concluded by offering to set off the damages.—Third plea: as to not repairing and yielding up in repair certain buildings erected on the premises during the term:

That the said buildings were not in being at the time of making the indenture, and were built after the commencement of the term, and were then entirely new erections and not built in the place of anything standing on the land at the time of the demise. On demurrer to these pleas:—

*Held*: First, that the third plea was bad: for as the covenant was not a covenant absolutely to do a new thing, but to do something conditionally, viz., if new buildings were erected on the demised premises to repair them; and, as when built they would be part of the thing demised, the assignee was bound, though not named.

Secondly, that the second plea was not good as an equitable defence; or as a defence at law, in avoidance of circuity of action, inasmuch as the covenants were not co-extensive, and the damages could not be identical.

*Quære*, whether a plea professedly on equitable grounds can be held good at common law. *Minshull v. Oakes and Another*, 793

(2). *To Perform Works—Implied Covenants to Permit the Works to be Executed.*

By deed, reciting that the defendants, a waterworks Company, had determined to construct a well, &c., and that the engineers of the Company had prepared the necessary drawings for the same, and made a general specification referring to the said drawings of all the works to be done, and of the materials to be found and provided for that purpose; that the plaintiffs had agreed to make the well, &c., and to execute all the works particularized in the said specification, and which might be implied therefrom or incidental

thereto, for 3880*l.*; and that to the drawings and specification the corporate seal of the Company had been affixed, and that the plaintiffs had signed the same: the plaintiffs covenanted to complete the well, &c., and works mentioned and specified in the specification or shewn in the drawings, or which may be reasonably implied therefrom or be considered incidental thereto, of the materials and in manner and in all respects therein mentioned; and that they would find all materials required in the making and completing the works of such sort, &c., as in the specification described; and all scaffolding, engines, pumps, &c., mentioned in the specification, as required to be provided by the person contracting to perform the said work, as might be found necessary to complete the works, and labour, &c., necessary for the construction and completion of the well in a workmanlike manner, and in all respects conformable to the specification; and fully to complete the works in a workmanlike manner on or before the 22nd of September then next (with power to the engineer of the Company to delay the work and grant an extension of time if he should think proper). If not completed in manner aforesaid on the 22nd of September, the plaintiffs to be liable to a penalty of 20*l.* weekly. The defendants covenanted to pay the 3880*l.*, and such further sums as should be payable in respect of deviations from the works. The specification, which was under the seal of the Company, contained the following passage:—"The contractor will be required to sink the well, &c., to the depth of 120 feet, &c., after which the Company will undertake the erection of the permanent steam-engine and permit the pumping to be performed by it, sufficient interval

of time being allowed for the erection of the steam-engine, and such time added to the period assigned to the contractor for the performance of the works. *Held*, that there was an implied covenant on the part of the Company to erect the permanent steam-engine as provided in the specification. *Knight and Another v. The Gravesend and Milton Waterworks Company*, 8

(3). *For Quiet Enjoyment—What is a Breach of.*

By indenture, the defendant demised to the plaintiffs a coal mine for a term of years, with liberty to dig and sink pits, &c., for obtaining the coal. And the defendant covenanted with the plaintiffs that they might peaceably and quietly have, hold, occupy, possess and enjoy the mine during the term, without any molestation, interruption or disturbance whatever of, from, or by the defendant. After the making of the indenture the defendant excavated a quarry of ironstone, lying under some of the closes under which the demised mine was situate, but above that mine; and made holes from the strata of ironstone into the demised mine; and thereby caused quantities of water to percolate into the demised mine; and the defendant also by excavating the quarry caused parts of the roof of the demised mine to fall in, and by reason of the premises the demised mine became flooded, and the working of the coal was rendered impracticable. *Held*, that though the defendant had a right to excavate the quarry, yet as the excavation had caused an interruption of the plaintiffs' occupation of the demised mine, the defendant was liable for a breach of his covenant for quiet enjoyment. *Shaw v. Stenton*, 858

(4). *Independent.*

Declaration against a subscriber to a projected railway Company, on a covenant in the subscription contract to pay the expences in the event of an act of parliament not being obtained. The defendant, who was under terms of pleading issuably, pleaded (inter alia) a plea setting out the subscription contract, which also contained a covenant by the subscribers to pay the amount of their subscriptions in such sums and at such places and times as should be required or appointed by the Board of Directors. The plea then averred that the defendant had not been required by the Board of Directors to pay his subscription or the expences. The plaintiff having signed judgment:—*Held*, that the plea was not issuable. *Millett and Another v. Browne*, 837

## DAMAGE.

(1). *When too Remote.*

See MASTER AND SERVANT, (2).

(2). *Measure of Damage in Action for Nonpayment of Premiums on Policy of Insurance.*

The plaintiffs lent to the defendant 800*l.* on the security of an indenture whereby two policies of insurance were charged with the payment of the principal money and interest. The indenture contained a covenant by the defendant to pay the premiums of the policies. By their terms the policies only remained in force provided the premiums were paid every year. The defendant paid the first year's premium only, and the plaintiffs having sued him on his covenant for nonpayment of the three subsequent years' premiums:—*Held*, that as it did not appear that the plaintiffs had sustained any loss by

the defendant's neglect to keep up the policies, the measure of damage was not the amount of the three years' premiums, but the plaintiffs were entitled to nominal damages only. *The National Assurance and Investment Association v. Best*, 805

(3). *Measure of in Action for Non-repair of Premises after Forfeiture of Term by Landlord.*

The defendant, an under-lessee who had covenanted with the plaintiff, his lessor, to keep, and at the expiration or sooner determination of the term, to leave and deliver up the premises in repair, allowed them to become out of repair. While they remained in this condition, the plaintiff having committed a forfeiture by nonpayment of rent, the superior landlord brought ejectment, and evicted the plaintiff and defendant.—*Held*, that the plaintiff was entitled to recover against the defendant substantial damages for the nonrepair of the premises. *Davies v. Underwood*, 570

## DEED.

(1). *What Amounts to.*

See COVENANT, (2).

(2). *Construction of.*

See CANAL.

## DEVISE.

See EMBLEMENTS.

*Construction of—Estate Tail.*

A testator by a codicil, (made before the 1st January, 1838) which he desired should be considered as annexed to and taken as part of his will, devised certain freehold land to P., to hold to P., her heirs and assigns for ever: Provided that in case she should depart this life without leaving lawful issue of her body,



then he gave and devised the same in manner and form by him given and devised by his will. By his will he had devised the said land to W. to hold to W., her heirs and assigns for ever: Provided, nevertheless, that in case W. should die without lawful issue living at the time of her decease, then the residue should go to and be possessed by P., her heirs and assigns for ever: Provided also, that in case W. and P. should both die without leaving issue lawfully born of their bodies, then the said land should go to the daughters of R. and F., and their heirs.—*Held*, that by the codicil P. took an estate tail.  
*Biss and Wife v. Smith*, 105

#### DISCOVERY.

See COMMON LAW PROCEDURE ACT,  
1854, (2) (3).

#### DISTRESS.

- (1). *Surplus Goods—Monies—Remedy against Broker by Owner of—Trover—Money had and Received.*

Where goods distrained for rent in arrear have been removed to a convenient place for sale and sufficient sold to satisfy the distress, the proper course is for the broker to leave the surplus money with the sheriff and return the surplus goods to the premises from whence he took them.

D. assigned his furniture to the plaintiff as a security for money advanced. The deed of assignment provided that on default in payment of the principal or interest on a day named, or such earlier day as the plaintiff should appoint by notice, it should be lawful for the plaintiff to take possession of the furniture; but that until default D. should hold it. D. being indebted to his landlord for

rent, the defendant, a broker, distrained the furniture. The plaintiff gave notice to D. to pay the principal money and interest, and he afterwards gave notice to the defendant that D. had assigned the furniture to him. The defendant on receiving this notice said that he would "take care it was properly acted on." The goods were removed from D.'s house to an auction room, and sufficient having been sold to satisfy the distress, the defendant returned the surplus goods to D.'s house and gave the surplus money to D.—*Held*: First, that there was no conversion of the goods by the defendant: Secondly, that the action for money had and received could not be maintained for the surplus money. *Evans and Another v. Wright*, 527

- (2). *Second Distress—Where Former Distress Unproductive.*

The defendant had distrained a stack of the plaintiff, which was sold under the distress by auction, one of the conditions of the sale being that the purchaser should pay for the same at the fall of the hammer. The plaintiff, who was present at the sale said, it was "one thing to buy the stack and another to take it away." The purchaser did not pay the price or any deposit, and the stack remained on the plaintiff's premises, a lock having been put on the gate of the field where it was, by the auctioneer. The purchaser having attempted to remove the stack a few days afterwards, was prevented from doing so by the violence of the plaintiff and several other men. He then repudiated the purchase and refused to pay for the stack. The defendant then distrained again. The jury having found that the purchaser had not at any time after the sale an

opportunity of taking away the stack.  
—*Held*, that the second distress was lawful. *Lee v. Cooke*, 584

## EASEMENT.

*Pleading—Prescriptive Enjoyment.*  
—*Support of Foundation of House by subjacent Strata as of Right for twenty years—Contentious Enjoyment.*

Declaration: that the plaintiff was lawfully possessed of certain messuages, belonging to and supporting which were certain foundations, which by reason of his possession of the messuages, the plaintiff of right had enjoyed and was enjoying, and still of right ought to enjoy for the support of the said messuages, which foundations the plaintiff was of right entitled to have supported by certain land in which quarries were worked: that the defendant negligently worked the quarries near to the said messuages, whereby the foundations were weakened and the messuages fell. On motion in arrest of judgment.—*Held*, that the declaration was sufficient.

The plaintiff in the year 1824 built a house on certain wastes, and in the following year obtained a grant from the Crown of the surface, excepting mines. The house was about thirty yards from a quarry. In the year 1840 the tenant of the owner of the minerals, who claimed a right to take the minerals without making compensation for damage to the surface, began to get stone from under the house, in consequence of which and of the blasting operations the house became untenable. In 1853 the defendant cut away certain supports which had been left under the house, and the house fell in. The Judge left the question to the jury, who found that the plaintiff had enjoyed the right of support for his

house on the foundations on which it stood without interruption for twenty years. On motion for a new trial, on the ground that the Judge ought to have told the jury that the enjoyment was contentious and not as of right.—*Held*, that the question was properly left to the jury.

*Quere*, whether, independently of prescription, the owner of the surface has not a right to the vertical support of the subjacent strata, for the surface and for all reasonable buildings put upon it. *Rogers v. Taylor*, 828

## EASTERN COUNTIES RAILWAY ACT.

(6 & 7 WM 4, c. CVI., ss. 237, 238).

*Power of Justice under, to issue Warrant before Conviction.*

*See* JUSTICE OF THE PEACE.

## EASTERN COUNTIES RAILWAY COMPANY.

*Working Agreement with Eastern Union and Norfolk Railways—7 & 8 Geo. 4, c. xlii., s. 3—“Diverting or Abstracting Water.”*

An Act, 7 & 8 Geo. 4, c. xlii., for making a navigable communication for ships between the city of Norwich and the sea, empowered the Company of Proprietors of the Norwich and Lowestoft Navigation to erect a lock or sluice, with proper stop-gates, to prevent the waters of a broad and certain navigable rivers from flowing into a certain lake, and to make an entrance cut from that lake to the sea. Section 3 provided, that nothing in the Act contained should authorize or enable the Company to divert or abstract any of the waters of the said broad or rivers for

any purpose whatsoever, except for the purpose of supplying certain intended cuts with water, and for the purposes of locking ships or vessels from or into the said lake. This entrance cut from the lake into the sea was constructed under the said Act, and the level of the water in the lake was kept lower than the level of the broad and rivers. The lock was made with proper gates in pursuance of the Act. By divers acts of parliament, and ultimately by 9 & 10 Vict. c. cxxxii., the said lock and works became vested in the Norfolk Railway Company. By an agreement between the Norfolk Railway Company and the Eastern Counties Railway Company, reciting that the works, including the lock in question, had become vested in the Norfolk Railway Company, it was provided that "The Eastern Counties Railway Company should have, as between themselves and the other Company, (but subject to such division and apportionment of gross receipts as is therein mentioned), the exclusive possession, use, enjoyment and receipt of all the property, rights, &c., of the works respectively in the same manner as the Norfolk Railway have become entitled to the same under or by virtue of the respective Acts, &c., or otherwise: That the Eastern Counties Company should at all times repair and keep up the said works with the appurtenances," &c.; and that the powers of the Norfolk Railway Company should be exercised by the Eastern Counties Company. Other clauses provided for the division of the profits in certain proportions after deducting the working expences, which were to be borne by the Eastern Counties Company. Clause 29 provided for the appointment of a joint committee of directors of the three Companies to superintend the work-

ing of the railways. By 17 & 18 Vict. c. ccxx., s. 2, the agreement was confirmed; and by s. 11, the Eastern Counties Company were to use, work, regulate and manage the five undertakings (in the Act mentioned) as if they were one undertaking. By s. 12, "the powers granted to the Companies respectively, by virtue of the recited Acts, or any of them, with respect to the user, working, regulation and management of their respective railways, works and undertakings, &c., were to be exercised and enjoyed by the Eastern Counties Railway Company, &c., under the same regulations and restrictions as were, by the recited Acts relating to that Company, imposed on that Company. After the making of the agreement, the Eastern Counties Railway Company entered into possession of the lock and works, and the Norfolk Railway Company were not in possession. At the time of the making of the agreement, the lock had been allowed to become out of repair, and such want of repair continued after the lock and works came into the possession of the Eastern Counties Railway Company; and during all that time large quantities of water escaped from the broad and rivers into the lake.—*Held*: First, that such water was diverted or abstracted contrary to the prohibition in 7 & 8 Geo. 4, c. xlii., s. 3. Secondly, that the Norfolk Railway Company were not responsible for the diversion or abstraction of the waters subsequent to the making of the agreement, and the passing of 17 & 18 Vict. c. ccxx., while the lock and works were in the possession of the Eastern Counties Railway Company. *Isaac Preston, Olerk to the Commissioners of the Haven of Great Yarmouth, v. The Norfolk Railway Company and the Eastern Counties Railway Company,*

## ECCLESIASTICAL LAW.

See CHURCH BUILDING ACTS.

## ELEGIT.

*Sheriff—Poundage.*

A sheriff is not entitled to poundage upon a writ of elegit, unless he has *extended* the land under the writ. Therefore, where a judgment creditor issued three writs of elegit on successive judgments, and the sheriff delivered to him possession of the land under the first writ:—*Held*, that the sheriff had no power to extend the land under the second and third writs, and consequently was not entitled to poundage on those writs. *Carter and Another v. Hughes*, 714

## EMBLEMMENTS.

*Title of Devisee of Land to, as against Executor.*

A testator devised to W. certain land called the "Clay pits," and bequeathed to C. and W. all his monies, &c., personal estate and effects whatsoever and wheresoever, not therein specifically bequeathed. There was no specific bequest of crops growing on the land.—*Held*, that the devisee of the land was entitled to the emblements growing upon it at the time of the testator's decease. *Henry Cooper and Sarah Cooper, Executor and Executrix of W. Cooper, v. Edwin Woolfit*, 122

## EQUITABLE PLEAS AND REPLICATIONS.

See COMMON LAW PROCEDURE ACT, (5), (6).

COVENANT (1).

## ERROR.

*Proceeding in—By Plaintiff after judgment of Nolle prosequi on Special Case.*

See COMMON LAW PROCEDURE ACT, 1854, (1).

## ESTOPPEL.

*Pretended Sale of Goods.*

The plaintiff, being in difficulties and fearing that some of his creditors would issue execution against his goods, agreed with the defendant, who was also a creditor, that there should be a pretended sale of them to him. For this purpose an invoice was made out and a receipt given to the defendant for a sum therein stated to be the purchase money, and possession of the goods was delivered to the defendant. Afterwards the defendant sold the goods as his own, whereupon the plaintiff brought trover.—*Held*, that no property in the goods passed to the defendant; and that the plaintiff was not precluded from shewing that no payment was in fact made and that the transaction was not a real, but a pretended sale. *Bowes v. Foster*, 779

## EVIDENCE.

See ATTORNEY.

BOROUGH ENGLISH.

CONTRACT, (1), (2).

INCLOSURE ACT.

LANDS CLAUSES CONSOLIDATION ACT, (1).

MALICIOUS PROSECUTION.

SHERIFF.

*Covenant not to use Premises as Shop without Licence—Presumption of Licence from 20 years user.*

A lease contained a covenant on

the part of the lessee that he would not, without the consent of the lessor, use, exercise, or carry on in the demised premises any trade or business whatsoever, nor convert the dwelling-houses into a shop, nor suffer the same to be used for any other purpose than dwelling-houses. One of the dwelling-houses was converted into a public house and a grocery shop, and the lessor, with full knowledge of it, for more than twenty years received the rent. The plaintiff, having purchased the reversion of the lessor, brought an action of ejectment for the breach of the covenant.—*Held*, that the user of the premises in their altered state for more than twenty years, with the knowledge of the lessor, was evidence from which a jury might presume a licence. *Gibson v. Susannah Doe*, 615

## EXECUTION.

*By ca. sa.—Countermand of Writ—Effect of discharge from custody by authority of Attorney.*

The plaintiffs having recovered judgment against the defendant, in June, 1855, issued a ca. sa. thereon, and a warrant was delivered to W. an officer of the sheriff. A few days afterwards the managing clerk of the plaintiffs' attorney wrote to W. requesting him not to execute the writ. In January, 1856, the defendant was arrested by S., another officer of the sheriff, under a ca. sa. issued on a judgment obtained against the defendant by another creditor. On the same day the defendant paid the amount due on that judgment. S., before discharging the defendant, sent to the sheriff's office to inquire whether there were any other writs against him, and in answer received a copy of the warrant granted on the writ

issued by the plaintiffs. The managing clerk of the plaintiffs' attorney having heard of the defendant's arrest reminded W. of the countermand of the plaintiffs' writ, when W. required a countermand signed by the attorney, which was sent, and the defendant was discharged from custody. In an action by the plaintiffs against the defendant on their judgment.—*Held*: That there was no arrest of the defendant under the plaintiffs' writ, either in fact or in law, and that, even if there had been, there was no discharge from custody by the plaintiffs, and consequently the action on the judgment was maintainable. *The National Assurance and Investment Association v. Best*, 605

## EXECUTOR.

*See EMBLEMENTS.  
REVENUE, (3).*

## EXTENT.

*Sale of Lands under 25 Geo. 3, c. 35  
—Fund in Court—Who entitled to increase of.*

The lands of a debtor to the Crown having been extended and sold under the 25 Geo. 3, c. 35, the purchaser in 1802 obtained an order for payment of the money to the deputy remembrancer, subject to the order of the Court of Exchequer. The money was invested in the funds, and the dividends were from time to time reinvested. The money remained in Court till 1857, when the fund had increased to an amount more than sufficient to satisfy the debt of the Crown.—*Held*, that the Crown was not entitled to a share of the surplus arising from the investment, but only to the principal, interest and costs. *The King (Geo. III.) v. De La Motte*, 589

FEEES FOR CHRISTENINGS.

*Action for Money had and received by Party entitled to.*

See CHURCH BUILDING ACTS.

GLANDERED HORSE.

*Semble*: That it is not legal to sell a glandered horse. *Hill v. Balls*, 299

*Action for Selling.*

See PLEADING.

GOODS SOLD.

*Action for, when maintainable.*

- (1). *Goods supplied by Person to whom Order not given.*

The defendants, who had been in the habit of dealing with B., sent a written order for goods directed to B. The plaintiff, who on the same day had bought B.'s business executed the order without giving the defendants any notice that the goods were not supplied by B.—*Held*, that the plaintiff could not maintain an action for the price of the goods against the defendants. *Boulton v. Jones and Another*, 564

- (2). *Goods to be Paid for by Bill or in Cash—Election to pay Cash.*

The defendant bought goods upon the following terms of payment:—"Four months bill on the 10th of the month following delivery, or 2% for cash." After the delivery of the goods he paid part of the price in cash.—*Held*, that he had exercised his option of paying ready money, and therefore that the plaintiff might sue him for goods sold without waiting for the expiration of the four months. *Schneider and Another v. Foster and Others*, 4

GUARANTEE.

*Construction—Consideration.*

The following guarantee was held, by *Bramwell, B., and Watson, B.* (dissentiente *Pollock, C. B.*) not to be founded on a sufficient consideration:—"I am aware that my uncles J. and J. F. K. stand considerably indebted to you for professional business and for cash advanced to them, and that it is not in their power to pay you at present, and as in all probability they will become further indebted to you, though I by no means intend that this letter shall create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past or future transactions between you and my said uncles to a certain extent; and, therefore, in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum they may be indebted to you upon the balance of accounts at any time during the next six years to the extent of 1000*l.* whenever called upon by you to pay the same, and after twelve months previous notice." *Maria Oldershaw and Robert Mushet, Executrix and Executor of Robert Oldershaw, v. William Thomas King*, 399

In August 1848, the defendant entered and gave the following guarantee to O.—"I am aware that my uncles J. and J. F. K. stand considerably indebted to you for professional business and for cash advanced to them, and that it is not in their power to pay you at present, and as in all probability they will become further indebted to you,

though I by no means intend that this letter shall create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past or future transactions between you and my said uncles to a certain extent: and, therefore, in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum they may be indebted to you upon the balance of accounts at any time during the next six years to the extent of 1000*l.* whenever called upon by you to pay the same, and after twelve months previous notice." At the date of the guarantee J. and J. F. K. were indebted to O. in the sum of 513*l.* Subsequently O. advanced large sums of money to J. and J. F. K., and dealings went on till January 1849, when the debt due from them to O. amounted to 2184*l.* — *Held*, by the Court of Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the guarantee was founded on a sufficient consideration, and that further advances having been made and time given, it bound the defendant.

Per *Curiam* (dissentiente *Crompton, J.*), the consideration for the promise to guarantee was the keeping the account open and making further advances. Per *Crompton, J.*, that the consideration expressed being the forbearing to press for immediate payment, no other consideration could be implied. Per *Curiam*, that an agreement to forbear for a reasonable time is a good consideration to support a promise to guarantee a debt from a third person. *Maria Oldershaw and Robert Mushet, Executrix and Executor of Robert Oldershaw, v. William Thomas King*, 517

## HABEAS CORPUS.

*Practice.*

This Court will grant a rule calling on a committing magistrate to shew cause why a writ of habeas corpus should not issue to bring up a prisoner, in order that the validity of the warrant of commitment may be discussed on shewing cause. *Es parte Cross*, 354

## HIGHWAY.

- (1). *Insufficiency of Bridge across a Canal intersecting.*

*See* CANAL COMPANY.

- (2). *Stopping by Enclosure.*

*See* INCLOSURE ACT.

## HORSE REPOSITORY.

Not necessarily "a public and open place" within the meaning of those words in 16 & 17 Vict. c. 62, s. 1. *Hill v. Balls*, 299

## HUSBAND AND WIFE.

*Pledge by Wife of her separate Estate—Authority to receive Dividend—Revocation.*

T., a married woman, being entitled for her separate use to the dividends of certain government stock standing in the name of the plaintiff as her trustee, the plaintiff gave to the defendants, a banking Company, a power of attorney to receive the dividends and at the same time directed them to pay the dividends to T. T. directed the defendants to pay the dividends to S. & B., bankers at Brussels, to whom she had pledged them for advances made by S. & B. to her husband.

The defendants for some time paid the dividends to S. and B., but at length T. wrote to the defendants as follows:—"I think it right to inform you that in consequence of the death of one of my trustees, as well as my having left Brussels, I have been obliged to have a new power of attorney made to receive my own dividends, and I shall not therefore have occasion to trouble you to do so."—No new power of attorney was made out and the defendants received the ensuing half-yearly dividend and transmitted it to S. & B. The plaintiff having sued the defendants for that dividend—*Held*, in the Exchequer Chamber, that the letter of T. did not amount to a revocation of the authority she had given the defendants to pay the money they received on her account to S. & B., and consequently that the plaintiff could not recover *Clerk v. Laurie, Public Officer, &c.* 199

ILLEGALITY.

*Usury—Substituted Agreement.*

By agreement made in 1794, 8000*l.* stock was transferred by O. to H., upon the terms that H. should repay the money produced by the sale of it or replace the stock at the option of O., and in the mean time pay interest at the rate of 5 per cent.; the loan was secured by bond, mortgage, and a deed of covenant. O. and H. being dead, E. O. being the legatee and heiress, but not the personal representative of O., and J. H. being the devisee of H., J. H. applied to E. O. to assist him to raise money, which E. O. agreed to do on having a security for the replacement of the stock. E. O. accordingly assigned the bond, mortgage, and deed of covenant of 1794, to H. and P., by way of mortgage, to secure an advance to J. H., and in consideration

thereof, J. H., in 1842, by indenture, conveyed to E. O. the premises comprised in the original mortgage, together with other lands, by way of mortgage, with a proviso and covenant to secure the transfer to E. O. of 8000*l.* stock. E. O. died, and by her will forgave the mortgage debt of 1842 to J. H.—*Held*, that the mortgage and covenant of 1842 were not so connected with the illegal agreement of 1794 as to be usurious and void; and that therefore legacy duty was payable on the bequest. *The Attorney General v. John Hollingworth,* 416

INCLOSURE ACT.

*Award under—Stopping highway—User in accordance with evidence—Presumption of order of Justices.*

By the General Inclosure Act, 41 Geo. 3, c. 109, s. 8, in case the Commissioner shall be empowered to stop up any old or accustomed road passing through any part of the old inclosures, &c., the same shall in no case be done without the concurrence or order of two justices. The 53 Geo. 3, c. lxi. (The Flint Inclosure Act), by s. 1, appointed a Commissioner to carry the Act into execution, subject to such of the regulations, restrictions and provisions, &c., in the 41 Geo. 3, c. 109, as were not altered, varied, controlled by or repugnant to the provisions of that Act. Sect. 19 enacts, that it shall be lawful for the Commissioner to stop up any old or accustomed public road or roads over the *marshes, commons and waste lands*, subject nevertheless to the concurrence of two justices, and under such regulations as are contained in 41 Geo. 3, c. 109, and provided that the old roads should not be discontinued till the new roads were properly formed. The marshes were



allotted in 1819, when a gate, which had since been kept locked, was put up across an old road, but the road had since been used by foot passengers occasionally. The award of the Commissioners, executed in 1830, set out the new roads and directed the old roads to be stopped up. A certificate of two justices, that the new roads had been formed and completed, under the 9th section of 41 Geo. 3, c. 109, was put in and proved; but no order of two justices for stopping the old road was produced.—*Held*, that it might be presumed that an order of two justices for stopping up the old road had been duly made. *Williams v. Eyton*, 771

## INCOME TAX.

*Rents or Royalties for Brick Earth—how to be Assessed.*

By indenture, a piece of land was demised with power to the lessee to get from the land, clay, brick earth, and other materials for making bricks, and to make the same into bricks upon the premises, for a term of fourteen years: paying to the lessor the yearly rent of 17l. 10s. for surface rent, by quarterly payments: also paying to the lessor, for royalty or brick rent, the yearly sum of 100l., by four equal quarterly payments on the same days: and also paying in respect of every thousand bricks over and above the first million which should be made on the premises in any one year, an additional royalty or brick rent of 2s., to be paid on the last day of every year.—*Held*, that both the royalties or brick rents were chargeable with income tax, and that it was payable in the first instance by the lessee who was entitled to deduct it from the amount due to the lessor. *Edmonds v. Eastwood and Others*, 811

## INJUNCTION.

*See COMMON LAW PROCEDURE ACT, (4).*

## INSOLVENT.

1 & 2 Vict. c. 110, s. 91—*New Contract for Payment of Old Debt.*

The defendant mortgaged to B. certain premises as a security for money lent, and B. obtained a judgment against the defendant for the principal and interest. The mortgage debt was afterwards assigned to the plaintiff in trust. The defendant took the benefit of the Insolvent Act, 1 & 2 Vict. c. 110, and the mortgage debt and judgment were inserted in his schedule. The defendant, in order to get rid of the judgment, afterwards agreed with the plaintiff to pay a part of the principal and interest due on the mortgage, and to join with a surety in a bond for payment of the remainder by instalments. The money having been paid and the bond given, satisfaction of the judgment was entered up. The plaintiff sued the defendant on the bond, and the jury found that in making the agreement the defendant's intention was to purchase the plaintiff's interest in the mortgaged premises and get rid of the judgment.—*Held*, that the transaction was not a new contract or security for payment of a debt, in respect of which the defendant had been discharged, within the meaning of the 91st section of the Insolvent Act. *Ambrose and Another v. Cook*, 73

## INSURANCE

## ON LIVES.

*Without Interest—Wagering Policy.*

To an action, by the executrix of

J. S., on a policy of insurance, by which the defendants agreed with J. S. to pay to his executors 2000*l.* on his death, the defendants pleaded that the policy was made by T. S. in the name of J. S., but for the use and benefit of T. S. and not for the use or on account of J. S.; that T. S. had not any interest in the life of J. S., and that the policy was a wagering policy contrary to the statute, whereby the policy was void. — *Held* a good plea. *Charlotte Shilling, Administratrix of James Shilling, v. The Accidental Death Insurance Company,* 42

## ON SHIPS.

- (1). *Voyage Policy on Salvage—Warranty of Seaworthiness.*

In a voyage policy of insurance on salvage, there is an implied condition or warranty of seaworthiness. *Knill and Another v. Hooper,* 277

- (2). *Policy on Rice in Ship or Ships to be declared free of Average—What may be declared—Valuation of Separate Bags.*

On an insurance of goods in "ship or ships" which were declared to be and to be valued "on rice, to be declared free from particular average," the insurer cannot, by indorsing a declaration of interest with a separate valuation of each bag of rice, create a separate insurance on each bag.

A policy of insurance, having been effected on goods "in ship or ships," declared to be "on rice, to be declared free from particular average," the insured indorsed on the policy a declaration which was afterwards marked with the initials of the underwriters as follows:—[R.] 500 bags rice, per "Laidmans," @ 8/3 per bag, 206*l.* 5*s.*; [R] 4,500 bags rice,

per "Margaret Skelly," @ 8/3 per bag, 1,856*l.* 5*s.* From each ship certain of the bags of rice were safely landed at their port of destination; others were jettisoned, being cast into the sea to save the ship; others, in the "Laidmans," on arriving at their port of destination, were cast into the sea, being unfit for consumption: others, in the "Margaret Skelly," were so much injured by sea damage as to be sold at the port of departure to which that ship was obliged to put back. The underwriters had paid the loss on the goods jettisoned. *Held*, that the assured were not entitled to recover the value of the bags of rice cast into the sea at the port of destination or sold at the port of departure. *Entwistle v. Ellis,* 549

## INTERPLEADER.

- (1). *Appeal—County Court.*

*See* COUNTY COURT, (2).

- (2). *Title of Claimant.*

In an interpleader issue to try whether certain goods were the property of the plaintiff as against the defendant, the execution creditor; it was proved that the goods were, at the time of the seizure, in the possession of the execution debtor to whom they had been let by the plaintiff. The goods were in fact the property of W., who had lent them to the plaintiff, who was his agent, allowing her to let them as owner to whom she would. *Held*, that the plaintiff had sustained her claim. *Green v. Stevens,* 146

## INTERROGATORIES.

*See* COMMON LAW PROCEDURE ACT, 1854, (3).

## INVENTORY.

*To be Exhibited in Scotland pursuant to 49 Geo. 3. c. 149, s. 38.*

*See* REVENUE, (3).

## IRREGULARITY.

*Ca. sa. set Aside for.*

*See* ATTORNEY, (2).

## JOINT STOCK COMPANY.

- (1). 7 & 8 Vict. c. 110, s. 29—*Contract with Directors.*

The 29th section of the 7 & 8 Vict. c. 110, which provides that no contract entered into by a Joint Stock Company, in which a director is interested, shall have force until approved and confirmed by the shareholders, (*except "a contract for the purchase of an article or of service, which is respectively the subject of the proper business of the Company,"*) does not authorize a director without the sanction of the shareholders, to sell any article or service to the Company, but only to deal with them in the way of their business.

Therefore, where an insurance Company employed one of its directors, for certain commission, to establish agencies in the country:—*Held*, that the contract was void, it not having been approved and confirmed by the shareholders. *Poole v. The National Provincial Life Assurance Society*, 687

- (2). *Pleas in Action Against.*

*See* PLEADING.

- (3). *With Limited Liability*—19 & 20 Vict. c. 47—*Liability of Directors.*

*See* PROMISSORY NOTE.

## JUDGMENT AGAINST BANKING COMPANY.

- (1). *Registering against Shareholder.*

*See* BANKING COMPANY.

- (2). *Order for Costs in Action in.*

*See* PRACTICE.

## JUSTICE OF THE PEACE.

- (1). *Power of to Commit a Defendant till he can be brought before Justices to Answer a Charge—Under 6 & 7 Wm. 4, c. cvi., ss. 237, 238.*

By the 6 & 7 Wm. 4, c. cvi., s. 237 (The Eastern Counties Railway Act), penalties are made recoverable before a justice, who is authorized to summon before him any person against whom complaint is made for any offence against a bye-law, and to proceed therein, &c. By the 238th section, "Any officer of the Company is empowered to seize and detain any person whose name and residence shall be unknown to him, who shall commit any offence against the Act, and to convey him before a justice without any warrant, and the justice is required to proceed immediately to the conviction or acquittal of the offender." The plaintiff, having been seized and detained by an officer of the Company, on the 24th of September was brought before the defendant, a justice of the peace, for an alleged offence against a bye-law. The defendant committed the plaintiff to the House of Correction, by a warrant in the Form (D 1.) in the Schedule to the Act, 11 & 12 Vict. c. 43. The warrant stated that the plaintiff had been charged on oath before the defendant, for having travelled on the railway without having paid his fare contrary to a bye-law of the Company, and commanded him

to be taken to the House of Correction and there kept until the 27th, and to be then brought before the justices at Petty Sessions to answer the charge. On the 25th, the defendant having ascertained that no offence had been committed sent to the House of Correction, and caused the defendant to be discharged.—

*Held:* First, that the defendant was justified, by the 16th section of the 11 & 12 Vict. c. 43, in committing the plaintiff to the House of Correction.

Under 6 & 7 Wm. 4, c. cvi., ss. 237, 238, a justice has no authority to issue a warrant before conviction; that the authority to arrest in the first instance is confined to the officer of the Company, and that the duty thereby imposed upon the justice is forthwith, upon the alleged offender being brought before him, to proceed to the determination of the case.  
*Gelen v. Hall,* 379

(2). *Action against for Malicious Conviction.*

The second count stated that the defendant, a justice of the peace, unlawfully and maliciously, and without reasonable or probable cause, took the information of P. W., against the plaintiff, and wrongfully, wilfully, maliciously, and without reasonable or probable cause, as the defendant well knew, convicted the plaintiff; that the plaintiff was thereby compelled to pay a sum of money, and that upon appeal to the Quarter Sessions the conviction was afterwards quashed. A verdict having been found for the plaintiff, the Court refused to arrest the judgment.  
*Gelen v. Hall,* 379

LANDLORD AND TENANT.

See BAILMENT.  
DAMAGES.  
EVIDENCE.  
LEASE.

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LAND TAX.

*New River Company—Wells Dug on Land of which Land Tax Redeemed.*

By charter of King James the First, the Governor and Company of the New River were incorporated, and the New River, cut and stream granted to them in fee. The shares of the proprietors have been held to be real estate. By the 38 Geo. 3, c. 5, the county of Hertford is to contribute 41,508*l* 10*s*. 9*d*., and the city of London 123,399*l*. 6*s*. 7*d*. towards the land tax. By s. 4, all the lands, tenements and hereditaments, &c., whatsoever, lying within the respective districts into which Great Britain was apportioned, and all persons, bodies politic and corporate, having any lands, are to be equally charged with a pound rate towards the sum imposed upon such respective districts. By the 57th section, all and any persons having any shares in the New River are to be assessed by the Commissioners for the city of London, and the tax is to be paid by the governor or the treasurer or receiver, to such person as the said Commissioners should appoint. From time to time various shareholders redeemed the land tax on their shares. The New River commences in Hertfordshire, and runs for three miles through the parish of A. in that county. The river, as it existed in 1798, has never been redeemed from land tax except as aforesaid. The Company have since that time purchased land in Hertfordshire, the land tax on the whole of which, with the exception of two roods and ten perches, has been redeemed. On part of the land so purchased, the land tax of which had been redeemed, there are two wells, from the sale of the water of which the Company derive a profit.

*Held*: First, that no other land tax is payable upon the property of the New River Company as it existed in 1798, than that imposed by the 57th section, and consequently that the river is not taxable in Hertfordshire.

Secondly.—That as to the property since purchased, the land tax of which had not been redeemed, that such property continues to be taxable in Hertfordshire.

Thirdly.—That the Company are not liable to be assessed to the land tax in respect of the springs inasmuch as the redemption of the land tax on the land on which the wells stand relieved the land and all its natural productions from any further tax, though possibly at the time of such redemption it might not have been known that such springs existed. *The Governor and Company of the New River, brought from Chadwell and Amwell to London, v. The Commissioners of Land Tax for the Division of Hertford in the County of Hertford*, 129

#### LANDS CLAUSES CONSOLIDATION ACT, 1845.

##### (1). *Sect. 68. Inquisition—Of what it is Evidence.*

In an action on a verdict and judgment obtained in an inquisition before a sheriff's jury, under the 68th section of the Lands Clauses Consolidation Act, 1845, the inquisition is not conclusive evidence that the plaintiff is entitled to compensation. *Chapman v. The Monmouthshire Railway and Canal Company*, 267

##### (2). *Sect. 94. Intersected Lands—Action of Mandamus to compel Railway Company to make Communication in a Town.*

Provisions in the "Lands Clauses

Consolidation Act, 1845," commence, "And with respect to *small portions of intersected land*, be it enacted as follows." Section 93, "If *any lands not being situate in a town or built upon*, shall be so cut through and divided by the works as to leave on both sides, or on one side thereof, a less quantity of land than half a statute acre," the owners of the intersected lands may insist on sale, unless such owner have other lands adjoining. By the 94th section, "If *any such land* shall be so cut through and divided as to leave on either side of the works a piece of land of less extent than half a statute acre, or of less value than the expence of making a bridge, culvert, &c.; and if the owner of such lands have not other lands adjoining such piece of land, and require the promoters of the undertaking to make such communication, then the promoters of the undertaking may require such owner to sell to them such piece of land," &c. *Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the words, "such land" in the 94th section, referred to the words "lands not being situate in a town or built upon" in the 93rd; and, therefore, that the owner of intersected land so situate could compel the promoters of such an undertaking, in an action claiming a writ of mandamus, to make accommodation works for his convenience, pursuant to the 68th section of "The Railways Clauses Consolidation Act, 1845."—*Erle, J.*, dissentiente. *Marriage v. The Eastern Counties Railway Company and The London and Blackwall Railway Company*, 625

#### LEASE.

See COVENANT, (1), (3).

*Construction of—Demise of Streams of Water that may be found—Reservation of Mines.*

By lease, dated 1827, Lord Derby "did demise to W. a dwelling-house and 15 closes of land, and did grant all streams of water that may be found in closes of land called the Clough, the Moorin Clough, the Brow, and the Marleds, except out of this demise all timber and other trees, plants, woods, underwoods, mines and minerals, metal, delfs, and quarries, and all stone, gravel, sand and clay, and all marl; and all ways and roads for the convenience of the said Earl, his heirs or assigns, or his tenants in Elton, through the demised premises for such purposes as the said Earl, his heirs or assigns, may require; and all streams of water, except those above granted, now being or hereafter to be found in or upon the premises demised, with power for the said Earl, his heirs and assigns, and his and their servants and workmen, from time to time, to enter upon the premises with or without horses and carriages, and to crop, fall, search for and make marketable all or any of the before mentioned articles; to make any clay into bricks or tile on the premises; to stack, bark and burn wood for charcoal; and to carry away and remove the same at pleasure; and to divert or alter the course of any river, brook, spring, or water."—There was a plan annexed to the lease shewing a stream of water on the north side of the demised premises, and flowing through their whole extent from west to east. The Clough, the Moorin Clough, the Brow, and the Marleds, were situate on the banks of this stream. There was no other stream on the surface, but certain wells were in existence in those closes, and other springs were subsequently found.

*Held*, that the wells and all water in the Clough, the Moorin Clough, the Brow, and the Marleds passed by the grant in question to W., and that neither Lord Derby nor his lessees could work mines so as to cut off any of the springs in the closes in question. *Whitehead v. Parks*, 870

## LEGACY DUTY.

See ILLEGALITY.

## LICENCE.

See CONTRACT, (5).  
EVIDENCE.

## LIMITATIONS (STATUTE OF).

(1). *Acknowledgments to take Debt out of Statute.*

Debt for goods sold and work done. Plea—Statute of Limitations. The plaintiff, within six years, had sent in his bill to the defendant. The defendant wrote in answer as follows:—"I have received your bill. It does not specify sufficiently to which cottages the work is done, for instance (as to some of the items) I do not know where all this is done, I shall feel obliged if you will more particularly explain. It is my wish to settle your account immediately, but being at a distance I wish everything very explicit and correct. I have asked H. to mark the agreements and send them to me, and I will return them by the first post with instructions to pay if correct." *Held*, that the letter was a sufficient acknowledgment to take the debt out of the Statute of Limitations. *Sidwell v. Mason*, 306

In answer to an application for payment of a debt the debtor wrote

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as follows:—"I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of payment and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance."  
—*Held*, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the letter contained no sufficient acknowledgment or promise to take the case out of the Statute of Limitations. *Rackham v. Marriott*, 196

### (2). *Replication to Plea of.*

*See* PLEADING.

## MALICIOUS CONVICTION.

*Action for.*

*See* JUSTICE OF THE PEACE.

## MALICIOUS PROSECUTION.

*See* COUNTY COURT, (1).

*Evidence of want of reasonable and probable Cause.*

In an action for maliciously causing the plaintiff to be arrested, it appeared that the plaintiff was employed to work up some timber into spars, under a contract with H., by which he was to be paid 48*l.* by weekly instalments during the progress of the work, and the balance on the completion of it. Before the work was completed H. assigned all his goods to the defendant and others for the benefit of his creditors gene-

rally. At this time about 19*l.* remained due to the plaintiff as the value of the work done up to that time. The plaintiff went to the defendant's yard where the spars were and asked for them, and on the defendant's foreman refusing to give them up he took them away the next morning at 4 o'clock A.M. His attorney then wrote to the defendant's attorney to say that he claimed a lien on the spars. The defendant demanded them back, but the plaintiff refused to give them up. The plaintiff was then taken into custody for stealing the spars on the information and complaint of the defendant. He asked the defendant why he gave him into custody, to which the defendant replied: "You had no right to take the spars away. I think you merely fetched them away to get what was your due."—*Held*, that there was evidence of the absence of reasonable and probable cause for the charge. *Huntley v. Simson*, 600

## MANDAMUS.

*Action Praying.*

*See* LANDS CLAUSES CONSOLIDATION ACT.

## MASTER AND SERVANT.

### (1). *Liability of Municipal Corporation acting in execution of Powers of Local Act, for Acts of Servants.*

The defendants, a municipal corporation, were empowered by act of parliament to construct gas works and to supply gas and sell and dispose of the coke: the surplus profits to go in reduction of the water rates and otherwise towards the improvement of the town. In an action

against the defendants, the declaration alleged that they employed workmen to lay down the pipes, who so negligently conducted themselves that a piece of metal was projected against the plaintiff. Plea.—That the grievances were bonâ fide done by the defendants in the course of executing the powers conferred on them by their Act, and without any neglect, misconduct, &c., of the defendants, otherwise than by their workmen or one of them, and that the workmen were well skilled and qualified and proper persons to be employed by them.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plea was no answer to the action. *Scott v. The Mayor, Aldermen and Citizens of the City of Manchester*, 204

(2). *Liability of Master for Accident to Servant while in his employ.*

A declaration stated that the plaintiff, a bricklayer, entered into the service of the defendants upon the terms that they should take and use all due, reasonable and proper means and precautions in order to prevent accident, damage or injury, or unreasonable or unnecessary risk, or damage from happening or occurring to the plaintiff in the performance of his duty as such servant; that the defendants did not take such reasonable precautions, and by reason thereof, and of the neglect of duty of the defendants, the plaintiff was employed on a scaffold which, for want of such precautions, was rotten and unsafe, which the defendants knew, and whereof the plaintiff was wholly ignorant, and in consequence thereof a part of the scaffold broke and the plaintiff fell to the ground. Pleas.—First: Not

guilty. Second: Traverse of employment on the terms alleged. At the trial, it was proved that the defendants had employed a labourer to erect the scaffold. The materials for the scaffold were in bad condition. The labourer broke several of the putlogs in trying them. One of the defendants told him to break no more, that the putlogs would do very well. The labourer used such as he thought sound. One of the putlogs so used having given way the scaffold fell, and the plaintiff was injured. On this evidence, the Judge at the trial directed a nonsuit.—*Held*, on appeal to the Court of Exchequer Chamber, that there was evidence to go to the jury of the liability of the defendants. *Roberts v. Smith and Another*, 213

Declaration against a master alleging that he knowingly, carelessly and negligently erected a hoarding in a street and left a certain machine in a position in which it was likely to cause danger to the workmen, and that a cart accidentally ran against the hoarding and knocked down the machine against the plaintiff. It appeared that a hoarding had been erected by the defendant, a builder, which projected too far into the street; but sufficient room was left for carts to pass; a heavy machine was placed inside the hoarding and close to it. A cart in passing struck against the hoarding and knocked down the machine against the plaintiff, a workman employed by the defendant. The plaintiff had previously made some complaint of the position of the machine to his master, but voluntarily continued to work though the machine was not moved.—*Held*, that there was no evidence to go to the jury of the master's liability. *Assop v. Yates*, 768



(3.) *Risks of Service—What are—Contributory Negligence of Master.*

A servant in the employment of the E. L. Company, engaged in repairing a carriage in a siding at a station in the joint occupation of the E. L. Company and the L. and Y. Company, was killed by an engine of the L. and Y. Company being shunted into the siding at which he was at work. It appeared that rules for the regulation of the station were published, headed in the joint names of the two Companies: and that the servants employed in shunting the engines were the joint servants of the two Companies, but the engine drivers and persons employed, as the deceased was, in repairing the carriage, were the separate servants of each Company. It was found that the rules as to the precautions to be taken before shunting trains into sidings, had been observed, and that there had been no negligence on the part of the deceased, the shuntsman, pointsman or engine driver; but that the accident was occasioned by the rules being defective.—*Held*, that the L. and Y. Company were liable to an action at the suit of the administratrix of such servant. *Vose v. The Lancashire and Yorkshire Railway Company*, 728

## MASTER AND SERVANTS ACT.

*See SERVANT.*

## MERCANTILE LAW AMENDMENT ACT.

(19 & 20 VICT. c. 97, s. 1.)

The Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 1, which enacts, that "no writ of execution against the goods of a debtor shall prejudice the title to such goods

acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure or attachment, provided he had no notice" does not apply in case where the writ of execution was delivered to the sheriff before the passing of the Act. *Williams v Smith*, 443

## MONEY HAD AND RECEIVED.

*See ARBITRATION*, (4).

CHURCH BUILDING ACTS.  
DISTRESS, (1).

## MUNICIPAL CORPORATION.

*Liability of, for Acts of Servants.*

*See MASTER AND SERVANT*, (1).

## NAVIGATION.

*See CANAL.*

(1). 7 & 8 Geo. 4, c. xlii., s. 3—*"Diverting or Abstracting Water."*

*See EASTERN COUNTIES RAILWAY.*

(2). 17 & 18 Vict. c. 104, ss. 296, 297—*Fairway—Negligence.*

By 14 & 15 Vict. c. 79, s. 27, "Whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel; and the master of any steam vessel navigating any river shall keep as far as is practicable to that side of the fairway or mid-channel thereof which lies on the starboard side of such vessel." The 17 & 18 Vict. c. 104, ss. 296, 297, contains similar provisions. A

steam vessel was proceeding down the river Thames, close to the Surrey shore, under the management of the defendant, a licenced pilot; when she came into collision with the plaintiff's barge which was sailing up the river. In an action for the damage thereby caused.—*Held*, that according to the true meaning of these Acts, it was the duty of the defendant to have kept the steam vessel to the starboard side of, but within, the fairway or mid-channel, and when he saw the risk of collision, to port her helm so as to pass on the port side of the barge, and therefore it was properly left to the jury to say whether, at the time of the collision, the steam vessel was on the starboard side and within the fairway or mid-channel, and, whatever was the position of the steam vessel, whether the collision was caused by the negligence of the defendant or not. *Smith and Another v. Foss*, 97

NEGLIGENCE.

See CANAL COMPANY.  
MASTER AND SERVANT.  
NAVIGATION.

NEW RIVER COMPANY.

See LAND TAX.

NOTICE.

To Produce—On whom to be served.

See SHERIFF.

PARTIES TO ACTION.

Defendant.

See CANAL COMPANY.

PARTNERSHIP.

See CONTRIBUTION.

*Transfer of Banking Account—  
Authority of Partner—Appropriation of Payments.*

H. and C., who carried on business in partnership, were indebted to R., their banker, to the amount, as admitted by H., of 979*l*. In 1851 R., with the concurrence of H., transferred his business to the M. Bank, including the account in question. The partnership account of H. and C. with the M. Bank commenced with this item of 979*l*., and continued open for a considerable time, during which H. paid in monies to an amount exceeding the sum of 979*l*. The pass book was regularly sent to H. The deed transferring the business from R. to the M. Bank, contained a provision, "That at the expiration of twelve months, as to such accounts as should not be taken to by the M. Bank, the M. Bank should, during a period not exceeding ten years, either accept or compel payment, or permit the same to remain due, and should be possessed of all monies paid in discharge of such accounts in trust for R." In 1852, the M. Bank gave notice to R. that they would not take to this amount. An action having been subsequently brought by the M. Bank against H. and C. to recover the balance due, *Held*:—First, that H. had power to bind his partner by assenting to the transfer of the debt on the account. Secondly, that the debt of 979*l*. was extinguished by the payments subsequently made by H. to the credit of the partnership account and the assent to the appropriation to be inferred from H. not objecting to the pass book; and that after such extinguishment, as between the M. Bank and the partnership, this account could not be treated as an existing debt remaining due to R.

*Quere*: Whether C. could have been bound by H. assenting to the sum of 979*l.* as the balance of the account due to R., if it had not been the balance really due. *Beale, Public Officer, &c. v. Caddick and Hartland,* 326

## PATENT.

*Novelty of Invention—When Question for Court—Claim too Large.*

In 1852, the plaintiff obtained a patent for an invention of improvements in the manufacture of gas; which was stated in the specification to "consist in the direct use of seeds, leaves, flowers, branches, nuts, fruit, and other substances and matters, containing oil, or oily or resinous matter," and it was also stated that the mode of using the materials might be "the same as the apparatus used in the ordinary mode of making gas from coal." The claim was as follows:—"I claim for making gas direct from seeds and matter herein named for practical illuminations or other useful purposes, instead of making it from the oils, resins, or gums, previously extracted from such substances." In 1829, H. had obtained a patent for improvements in illuminations or artificial light, and by his specification he proposed to use fatty substances, such as greaves or graves, also the residuum after the oil had been expressed from seeds, such as oil cake, also beech nuts, mast, cocoa nuts and other matters abounding in oil, and he proposed to use these substances separately and in combination. The plaintiff having brought an action for the infringement of his patent.

*Held*: First, that H.'s specification shewed that the making gas direct from seeds and other oily matters was not new at the date of the plaintiff's patent.

## PLEADING.

Secondly: That as the want of novelty appeared distinctly from a written instrument, it was for the Court and not the jury to determine the identity of the two supposed inventions.

Thirdly: That the claim, being merely for making gas direct from seeds and matter stated in the specification, without reference to any method of doing it, was too large and general a claim and could not be supported. *Booth v. Kennard,* 84

## PAYMENT.

*Appropriation of.*

See PARTNERSHIP.

## PLEADING.

## I. DECLARATION.

(1). *In Action for Sale of Glandered Horse.*

A declaration stated that the defendant was possessed of a horse afflicted with an infectious disease, to wit, the glanders, and knowing the horse to be afflicted with the said disease, caused the horse to be sold by auction at a certain horse repository; and the plaintiff believing the said horse to be healthy became the purchaser, and paid therefore 6*l.* 10*s.*, and by reason of the diseased state of the horse the same was worthless to the plaintiff, and the plaintiff paid 2*l.* 10*s.* to a veterinary surgeon for examining the said horse; and in consequence of the horse being put into a stable with another horse of the plaintiff's, the said other horse became infected and died.—*Held*, that the declaration disclosed no cause of action.

Per *Martin, B.*, and *Bramwell, B.*, that it is not illegal to sell a glandered horse; dubitante *Pollock, C. B.*

A horse repository is not necessarily a public and open place within the meaning of these words in the 16 & 17 Vict. c. 62, s. 1. *Hill v. Balls*, 299

*In Case for disturbance of Foundation—Statement of Title.*

See EASEMENT.

*In Case for Fouling Water.*

See WATER.

(2). *Plea.*

See CHELTENHAM IMPROVEMENT ACT.

In covenant for non-repair; that while defendants were possessed they demised to the plaintiff for a term less by thirty days than their own term; that the plaintiff covenanted to repair and yield up in repair, defendants finding certain iron work; that the want of repair complained of by the plaintiff was caused by his default and was a breach of his covenant, and that the defendants are entitled to recover from the plaintiff the same amount of damages, which they offered to set off.—*Held* a bad plea. *Minshull v. Oakes*, 793

(3). *Several Pleas.*

To a declaration on an annuity deed executed by three directors of a Joint Stock Company, the Court allowed the defendants to plead the following pleas, the second and third being verified by affidavit.—First: non est factum. Secondly: that the deed was invalid under the 7 & 8 Vict. c. 110, s. 29. Thirdly: that the directors making the deed had no power to bind the Company; that it was an excess of authority and to the prejudice of the shareholders,

and that the plaintiff knew the circumstances when he took it. *Curteis v. The Anchor Insurance Company*, 537

(4). *Issuable Plea.*

See COVENANT, (4).

(5). *Replication to Plea of Statute of Limitations.*

To a plea of the Statute of Limitations in an action on a promissory note, the plaintiff replied that the note was made by the defendant jointly with one T. P., and that within six years before suit T. P. paid the plaintiff interest on the note.—*Held*, that, assuming the payment to have been made before the passing of 19 & 20 Vict. c. 97, the replication was bad on general demurrer. *Ridd v. Betty Moggridge, Executrix of William Moggridge*, 567

(6). *Equitable Pleas and Replications.*

See COMMON LAW PROCEDURE ACT, (5), (6).

COMPANIES CLAUSES CONSOLIDATION ACT.

COVENANT, (1).

PRACTICE.

See CERTIORARI.

HABEAS CORPUS.

COMMON LAW PROCEDURE ACT, 1854.

(1). *Writ of Summons—Alteration of Date.*

The Court has no power to alter the date of a writ of summons. Where such an alteration is made by a Judge in order to prevent the operation of the Statute of Limitations, the defendant does not waive

the objection by appearing to the writ after notice. *Clarke v. Smith*, 753

(2). *Affidavits—Exhibits.*

Documents referred to in affidavits, and exhibited, must be handed in with the affidavits, and remain in Court until the matter, in respect of which the affidavits are sworn, has been disposed of. *Attenborough v. Clark*, 588

(3). *At Chambers—Order for Costs in Action on Judgment.*

An order that the plaintiff recover his costs in an action on a judgment, under the 43 Geo. 3, c. 46, s. 4, cannot be made by a Judge at chambers, except upon a summons to shew cause. *Lomax v. Berry*, 127

(4). *Judge's Order for Payment of Costs—Signing Judgment for Default of Payment.*

Where a Judge's order was made for payment of debt and costs, which were demanded immediately after taxation, and not being paid, the plaintiff on the same day signed judgment.—*Held*, that the judgment was irregular. *Perkins v. The National Assurance and Investment Association*, 71

PRESCRIPTION.

*See EASEMENT.*

*Unity of Seisin—Enjoyment as of Right—Adverse Possession—Recovery—Tenant to the Præcipe.*

In the year 1796 S. was seised in fee of a certain farm and also of an estate for life in a certain moor. In 1822, S. and the tenant in remainder

joined in a conveyance of the moor to C. in fee, that he might be tenant to the præcipe for the purpose of suffering a recovery, in order to create a mortgage term, but no recovery was suffered. In 1827, S. became bankrupt, and by subsequent conveyances his interest in the moor vested in the defendant, and his interest in the farm vested in the plaintiff. S. always occupied the farm by his tenants who had enjoyed without interruption the right of depasturing their cattle on the moor. In the year 1856, the defendant distrained the plaintiff's cattle damage feasant when the plaintiff claimed the right of common by enjoyment as of right for the respective periods of sixty and thirty years mentioned in the Prescription Act (2 & 3 Wm. 4, c. 71).

*Held*: First, that there was no unity of seisin to extinguish the easement or prevent its existence.

Secondly, that the title to the tenements was such that there could not, in point of law, have been an enjoyment of the right of common for the period of sixty years, *as of right*; for S. being owner in fee of the farm and also tenant for life and occupier of the common, the rights of the tenants of the farm over the common were derived from him, and as he could not have an enjoyment as of a right against himself within the meaning of the statute, so neither could his tenants.

Thirdly, that the conveyance by S. in 1822 to make a tenant to the præcipe, made no difference and consequently that the thirty years' claim could not be supported. *Warburton v. Parke*, 64

PRINCIPAL AND AGENT.

*See ATTORNEY (1), (2).*

## PUBLIC COMPANY.

### PROBATE.

*In respect of Shares in Railways in Scotland.*

*See* REVENUE, (3).

### PRODUCTION OF DOCUMENT.

*See* COMMON LAW PROCEDURE ACT, 1854, (2).

### PROHIBITION.

*See* COUNTY COURT, (1).  
PUBLIC HEALTH ACT, 1848.

### PROMISSORY NOTE.

*By Directors of Joint Stock Company, with Limited Liability.*

The following promissory note was signed by three directors of a Joint Stock Company, incorporated, with limited liability, under the 19 & 20 Vict. c. 47, and countersigned by the secretary of the Company.—“London, Dec. 31, 1856. Three months after date we jointly promise to pay S., or order, six hundred pounds for value received in stock, on account of the London and Birmingham Iron and Hardware Company.”—*Held*, that the note was binding on the Company, and not on the Directors who signed it. *Lindus v. Melrose and Others*, 293

## PUBLIC COMPANY.

*Subscribers' Agreement—Liability of Party executing to Calls, though Amount of Capital and Number and Amount of Shares changed after Execution of Deed.*

The subscribers' agreement of a

## PUBLIC HEALTH ACT. 928.

proposed Company stated that it was formed for making a railway, to be called “The Galway and Kilkenny Railway,” and to commence at Kilkenny and terminate in the town of Galway: the capital to be one million in shares of 25*l.* each. The deed empowered the directors to abandon the undertaking, or any part thereof, and also to make application to parliament for an Act for any of the purposes aforesaid: also to fix upon, and from time to time to alter or vary the termini, route, course, or line of the railway; and to determine whether and how far, and to what extent the undertaking should be carried into effect and deferred or abandoned: and in case any Act should authorize the construction of a part thereof, to make in any subsequent session application for the construction of the remainder. The defendant executed the deed as a subscriber for 150 shares and paid the deposit of 1*l.* 10*s.* per share. The directors applied to parliament, and in 1856 an Act passed which incorporated the Company by the name of “The Kilkenny and Great Southern and Western Railway Company,” for making a railway from Kilkenny to Cuddagh: the capital of the Company to be 225,000*l.*, divided into 11,250 shares of 20*l.* each. After the Act passed the name of the defendant was placed on the register of shareholders for fifty shares of 20*l.* each.—*Held*, that the defendant was a shareholder in the incorporated Company, and liable as such to execution on a judgment recovered by a creditor against the Company. *Nixon v. Brownlow*, 455

## PUBLIC HEALTH ACT, 1848.

(11 & 12 Vict. c. 63.)

(1.) *Appeal*.—"Sum Adjudged"—  
Sect. 135.

The 103rd section of "The Public Health Act, 1841," provides, that if any person assessed to a rate under that Act fail to pay the same when due, a justice may summon the defaulter to shew cause why the rate should not be paid: and if no sufficient cause be shewn, the justice may cause the same to be levied by distress. By section 135, any person who shall think himself aggrieved by any such rate, or by any order, conviction, judgment or determination of or by any matter or thing done by any justice in any case in which the penalty imposed or the sum adjudged shall exceed 20s., may appeal to the Court of Quarter Sessions held next after the making of the rate. The Act having been put in force within the borough of M., the Local Board made three several district rates, and assessed R. in sums amounting to 4*l.* 5*s.* 6*d.* in respect of premises occupied by him. R. refused to pay the rates on the ground that the greater portion of the premises occupied was not within the borough. He was thereupon summoned before two justices who made an order, whereby, after reciting the refusal to pay the rates, that the parties appeared before them, and having heard the matter of complaint, they adjudged that R. pay the several rates with costs, and that if the several sums be not forthwith paid, that the same be levied by distress. R. appealed against this order to the Court of Quarter Sessions, who quashed the order with costs to be paid by the Local Board, who thereupon appealed to this Court for a prohibition, on the ground that the appeal to the Sessions would not lie.—*Held*, that as the matter was not free from doubt, the Court ought not to grant a prohibition.

*Semble*: That the "sum adjudged" in the 135th section means the sum in respect of which the adjudication was made; and, therefore, that the order of the justices was a matter or thing done by them in which the sum adjudged exceeded 20s. within the meaning of that section. *Ricardo, Appellant, and The Maidenhead Local Board of Health, Respondent*, 257

## (2.) Sect. 133—"Party Grieved."

See CHELTENHAM IMPROVEMENT ACT, 1852.

## RAILWAY COMPANY.

See CARRIER.  
PUBLIC COMPANY.

## RAILWAYS CLAUSES CONSOLIDATION ACT, 1845.

SECTS. 46, 61, 68. .

*Liability of Company for Accident arising from Defective Fences.*

A railway crossed an occupation way which connected lands of the plaintiff lying on each side of the railway, and which was also a public footway. The crossing being on the level, at the point of intersection the Railway Company put up high gates of which they gave a key to the plaintiff. The gates obstructed the footway, but the Company did not make a bridge over the railway, or provide a stile for foot passengers in pursuance of 8 & 9 Vict. c. 20, ss. 46, 61, 68. The key having been lost, one of the gates was left open, and some colts of the plaintiff having escaped on to the railway were killed by a passing train.—*Held*, that it was a question for the jury, whether the plaintiff by his own negligence had contributed to the accident.

*Semble*, that if the fence of a railway obstructs a way, it is the duty of persons having a right to use the way not to prostrate the gates in order to abate the obstruction, but to seek their remedy in a Court of law. *Ellis v. The London and South Western Railway Company*, 424

## RAILWAY AND CANAL TRAFFIC ACT.

See CARRIER, (2).

## RESIDENCE.

- (1). *Of Attesting Witness to Bill of Sale.*

See BILL OF SALE.

- (2). *To give Jurisdiction.*

See COUNTY COURT, (6).

## REVENUE.

- (1). *Agreement—Stamp.*

The following document given by the plaintiff to the defendant was held to require a stamp as an agreement: "August 2.—According to Mr. H.'s (the defendant) request, the land at B. under Mr. E., I will be bound for till next Lady Day.—Rent 48l." *Glover v. Halkett*, 487

- (2). *Succession Duty Act, 1853, ss. 2, 18—Successor—Person "exempted," from Payment under Legacy Duty Acts.*

A testator bequeathed to trustees 5000*l.* in trust to invest the same and pay the dividends to his daughter during her life, and upon further trust after her death for her children, equally to be divided amongst them. The testator died in 1803, at which time no duty was payable on legacies to children or grandchildren. His

daughter died after "The Succession Duty Act, 1853," came into operation. By the 2nd section of that Act, "every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property upon the death of any person dying after the commencement of that Act, shall be deemed to have conferred, or to confer, on the person entitled by reason of such disposition a 'succession.'" By section 18, no duty shall be payable "by any person in case of a succession, who, if the same were a legacy would be exempted from the payment thereof under the legacy duty Acts."—*Held*, first, that the interest of the testator's grandchildren in the property bequeathed to them was a "succession," within the meaning of that Act: Secondly, that it was not within the exemption of the 18th section, since that applied only to express exemptions by former Acts, and consequently that succession duty was chargeable. *The Attorney General v. Fitzjohn and Another*, 465

*Succession Duty Act, 1853, s. 21—Person "Competent to Dispose by Will"—Successor a Lunatic.*

By the 21st section of "The Succession Duty Act, 1853," the duty chargeable on the succession to real property shall be paid by eight half-yearly instalments: "Provided that if the successor shall die before all such instalments shall have become due, then any instalment not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest."—*Held*, that the words



"competent to dispose by will" had reference to the interest in the property and not to the personal capacity; and therefore that the duty was chargeable notwithstanding the successor was incompetent to make a will by reason of lunacy or coverture. *The Attorney General v. Hallett*, 368

(3). *Companies Clauses Consolidation Act (Scotland)*, 1845—*Probate—Shares in Railway Companies in Scotland—Inventory*—48 Geo. 3, c. 149, s. 38.

A testator, domiciled in England, having died in the province of York, his property within that province was sworn under 100,000*l.*, and the will having been proved, probate duty was paid on that amount. The testator's personal property actually in that province amounted to 93,221*l.* in addition to which he was possessed of shares in railway Companies in Scotland, (such Companies being constituted under the Companies Clauses Consolidation (*Scotland*) Act, 1845), to the value of 5715*l.* In pursuance of the 19th and 20th sections of that Act the executors produced the probate with the proper declaration to the secretaries of the several railway Companies, and caused their own names to be inserted in the register of shareholders at the chief offices of the said Companies in Scotland; but, although more than six months had elapsed, did not exhibit an inventory properly stamped in the Commissary Court in Scotland, as required by the 48 Geo. 3, c. 149, s. 38. In an information for penalties for not exhibiting such inventory.—*Held*, that the duty imposed on executors by the 48 Geo. 3, c. 149, s. 38, to exhibit in the Court of Scotland an inventory properly stamped, is not

affected by the 8 & 9 Vict. c. 17, s. 20, and that therefore the duty on such inventory was payable in Scotland in respect of the shares. *The Attorney General v. John Higgins and Others*, 339

### SALE OF GOODS.

See CONTRACT, (1), (2).

### SCAVENGER.

See TOWNS IMPROVEMENT CLAUSES ACT, 1847.

### SCIRE FACIAS.

*Plea in.*

See COMPANIES CLAUSES CONSOLIDATION ACT.

### SERVANT.

*Absenting himself from Master's Service after former Conviction—Form of Conviction.*

B. agreed with H. & Co. to serve them as a potter from the 11th Nov. 1856 till the 11th Nov. 1857. He entered the service, but a dispute having arisen between him and his employers as to his wages, he left the service on the 10th March, 1857. On the 18th of March he was convicted by a justice of the peace for unlawfully absenting himself from his employer's service, and sentenced to one month's imprisonment, with hard labour, in the House of Correction. On the 17th April he was discharged from prison, and on the 29th was requested by H. & Co. to return to their service, but refused. On the 13th May he was again convicted by a justice, on a charge of unlawfully absenting himself from the service of H. & Co., and sentenced

to one month's imprisonment, with hard labour, in the House of Correction. A writ of habeas corpus having issued, the governor of the House of Correction returned that he held B. in custody under the warrant of a justice, which after reciting that complaint on oath hath been made to him that B. on the 11th November last contracted and agreed with H. & Co. to serve them as a potter, in their business as potters, until the 11th November next, and "having entered upon and worked under such agreement, and the term of his contract being unexpired, the said B. did on the 29th April last unlawfully misdemean and misconduct himself in his said service by neglecting and absenting himself from his said master's service without the leave of his said master, contrary to the provisions of the statute in such case made and provided. And, whereas the said B. being now brought before me the said justice to answer the said complaint, and I having duly examined into the nature thereof: Do adjudge the said complaint to be true, it appearing to me as well upon the examination on oath of M. in the presence of the said B. as otherwise, that the said B. having contracted as aforesaid to serve the said H. & Co. as a potter in their business of potters, and the term of his contract being unexpired, did on the 29th of April last misdemean and misconduct himself in his said service, by neglecting and absenting himself from his said master's service without the leave of his said master: I do therefore convict him the said B. of the said offence, and do order and adjudge that the said B. for his said offence be committed to the House of Correction at S., there to remain and be held to hard labour for the space of one calendar month. These are therefore to command you," &c.

*Held*: First, that, assuming the contract was dissolved by the conviction, affidavits might be used for the purpose of shewing that the absenting in respect of which the second conviction took place was the not returning to the service after the expiration of the imprisonment under the first conviction, for in that case the justice had no jurisdiction: Per *Pollock*, C. B., and *Watson*, B.; *Martin*, B. dubitante, *Bramwell*, B., dissentiente.

Secondly: That the contract was not dissolved by the first conviction: Per *Bramwell*, B., and *Watson*, B.; *Pollock*, C. B., dissentiente, *Martin*, B., dubitante.

Thirdly: That the conviction was not open to the objection that it did not affirmatively appear that B. had entered the service, or to the objection that the adjudication was made on evidence other than that taken in the presence of B.: Per totam Curiam.

Fourthly: That the conviction was bad, inasmuch as the justice had not adjudicated as to an abatement of wages during the period of imprisonment: *Watson*, B., dissentiente. *In re William Baker*, 219

## SHERIFF.

*See* ELEGIT.

EXECUTION.

MERCANTILE LAW AMENDMENT ACT.

*Notice to London Agent of.*

In an action against a sheriff for not arresting under a ca. sa., in order to connect the sheriff with the transaction the bailiff (who had not been served with a subpoena duces tecum) proved, that when the defendant went out of office the warrant was sent to the persons who acted as the London agents while the defendant

was sheriff, and who were also his attorneys on the record. *Held*, that notice to them to produce the warrant, after the defendant had gone out of office, was sufficient to entitle the plaintiff to give secondary evidence of its contents. *Suter v. Burrell*, 867

### SHIPPING.

*See* INSURANCE.  
NAVIGATION.

#### (1). *Contract—Authority of Ship's Husband.*

H. being the owner of a steamer sold 32-64th shares in her to M'C. & Co., and agreed that they should have the full and exclusive direction, management and control of the said steamer, to be dealt with and managed by them as managing owners and ship's husbands as they might think best without any let or hindrance of the said H., and as such managing owners and ship's husbands should have 5 per cent. on the gross earnings to be made or produced in any employment or service in which the vessel might be engaged by them. It being part of the agreement that M'C. & Co. were to pay to H. 900*l.* as a charter for his 32-64ths for the first six months, for which sum M'C. & Co. were to have the entire use and control of the steamer and all her earnings for that period. Repairs having become necessary during the continuance of the charter. *Held*, that under the agreement M'C. & Co. had power, as ship's husbands, to bind H. by contracts for such repairs, and that such repairs having been done, H. was liable for the price to the persons employed by M'C. & Co. as agents for the parties liable. *Preston and Others v. Tamplin and Holmes*, 868

H., being the owner of a steam vessel, sold 32-64th shares in her to M'C. & Co., and agreed that they should have "the full and exclusive direction, management and control of the said vessel, to be dealt with and managed by them, as managing owners and ship's husbands, as they might think best, without any let or hindrance of the said H.; and, as such managing owners and ship's husbands, should have 5 per cent. on the gross earnings, to be made or produced in any employment or service in which the vessel might be engaged by them; and further, that M'C. & Co. shall from henceforth be and become the managing and the exclusive owners, for the purpose of employing the said vessel in any service they may think fit. It being part of this agreement that M'C. & Co. were to pay to H. 900*l.* as a charter for his 32-64th shares for the first six months, for which sum M'C. & Co. were to have the entire use and control of the steamer and all her earnings for that period." Repairs having become necessary during the continuance of this charter.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that under the agreement M'C. & Co. had power, as ship's husbands, to bind H. by contracts for such repairs; and that such repairs having been done, H. was liable for the price to the persons employed by M'C. & Co. as agents for the parties liable. *Preston v. Tamplin and Holmes*, 684

#### (2). *Disabled Ship—Power of Master to bind Owner of Cargo by Contract—Charter-party—Warranty.*

A cargo of guano was shipped from the Chinca Islands to London

## SPECIFICATION.

by the "Oriente." The "Oriente" having become disabled, put into Valparaiso, was condemned and her cargo taken out of her. The captain, "for account and risk of the owner of the cargo," chartered the "Fairy Queen" to take on "the cargo brought by the 'Oriente,' being 470 tons more or less, not exceeding what she can reasonably stow," at the rate of 5*l.* 2*s.* 6*d.* per ton. The owner of the cargo had an agent at Valparaiso of which the captains of the "Oriente" and the "Fairy Queen" were aware, but no reference was made to him. After the guano had been loaded on board, the "Fairy Queen," the captain of that vessel said that he had not more than 350 tons on board, and ultimately the captain of the "Oriente" agreed that freight should be paid on the full quantity of guano mentioned in the charter-party, and in order to carry out the agreement a bill of lading was signed by the captain of "Fairy Queen," making the guano deliverable to M. & Co., the agents for the general average settlement of the "Oriente," or their assigns, he or they paying freight for the guano as 470 tons, as per charter-party. — *Held*: First, that the master of the "Oriente" had no power to bind the owners of the cargo to pay the freight mentioned in the bill of lading. Secondly, that the charter-party contained no warranty that the cargo amounted to 470 tons more or less; and therefore the owners of the cargo were not liable under the charter-party for not loading a full cargo. *Gibbs and Others v. Grey and Others. Grey and Others v. Gibbs and Others*, 22

## SPECIFICATION.

*See COVENANT, (2).*

P P P 2

## TOWNS CLAUSES ACT. 929

### SPRINGS.

*Right to.*

*See LEASE.  
WATER.*

### STAMP.

*On Agreement.*

*See REVENUE.*

### STATUTE.

*Construction—Retrospective Operation of.*

*See MERCANTILE LAW AMENDMENT ACT.*

### STAYING PROCEEDINGS.

*Within what Time Application to be made.*

*See CHELTENHAM IMPROVEMENT ACT.*

## SUCCESSION DUTY ACT, 1853.

*See REVENUE, (2).*

## TOWNS IMPROVEMENT CLAUSES ACT, 1847.

*Cleansing Streets—Liability of Commissioners to remove Dust and Ashes from Manufactories.*

Sections 87 to 98 of the Towns Improvement Clauses Act, 1847, are under the general heading, "and with respect to cleansing the streets." Section 87 enacts (*inter alia*), "that the commissioners shall cause all the dust, ashes and rubbish to be carried away from the houses and tenements of the inhabitants of the town or

district within the limits of the special Act at convenient hours and times." Section 50 of the Birmingham Improvement Act, 1851, enacts, "that, subject to the provision thereafter contained the clauses of the Towns Improvement Clauses Act, 1847, with respect to cleansing the streets, shall be incorporated with and form part of this Act." By the 57th section of the same Act, "the several clauses of the Towns Improvement Clauses Act, 1847, numbered respectively 87, &c., shall not extend to any lands used as arable, meadow, or pasture ground only, or to wood lands or market gardens, garden allotments or nursery grounds, or to any buildings or deposit on such lands, or to any roads or footways intersecting the same respectively." — *Held*, that under these sections the commissioners were not compellable to remove from a manufactory, dust, ashes and rubbish arising from the combustion of coal, and otherwise in the course of the manufacture of edge tools within the borough. *W. A. Lyndon v. T. Standbridge, Town Clerk of the Borough of Birmingham*, 45

## TROVER.

*Evidence of Conversion.*

*See DISTRESS.*

## UNITY OF SEISIN.

*See PRESCRIPTION.*

## USE AND OCCUPATION.

*By Trustee—On a letting by Cestui que Trust.*

Copyhold lands were devised to the plaintiffs in trust for F. for life, but the plaintiffs were never admit-

ted to the copyhold. At the time of the death of the testator the lands were in the possession of the defendant, to whom F., with the assent of one of the plaintiffs, afterwards re-let them in her own name. The plaintiffs then gave notice to the defendant to pay the rent to them.—*Held*, that an action for use and occupation would not lie by the plaintiffs against the defendant, because no contract could be implied between them, there having been an existing contract between the defendant and F., and the occupation having been by permission of F. *Churchward and Blight v. Ford*, 446

## USURY.

*See ILLEGALITY.*

## VAGRANT ACT.

*Frequenting Platform of Railway Station with intent to commit Felony.*

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that the declaration was good, for though there may be no right to water, there may be a right, if it comes or is sent, to have it come or sent without pollution: *Whaley and Another v. Laing*, 476

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THE END.

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district within the limits of the special Act at convenient hours and times." Section 50 of the Birmingham Improvement Act, 1851, enacts, "that, subject to the provision therein after contained the clauses of the Towns Improvement Clauses Act, 1847, with respect to cleansing the streets, shall be incorporated with and form part of this Act." By the 57th section of the same Act, "the several clauses of the Towns Improvement Clauses Act, 1847, numbered respectively 87, &c., shall not extend to any lands used as arable, meadow, or pasture ground only, or to wood lands or market gardens, garden allotments or nursery grounds, or to any buildings or deposit on such lands, or to any roads or footways intersecting the same respectively." — *Held*, that under these sections the commissioners were not compellable to remove from a manufactory, dust, ashes and rubbish arising from the combustion of coal, and otherwise in the course of the manufacture of edge tools within the borough. *W. A. Lyndon v. T. Standbridge, Town Clerk of the Borough of Birmingham*, 45

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*Evidence of Conversion.*

*See* DISTRESS.

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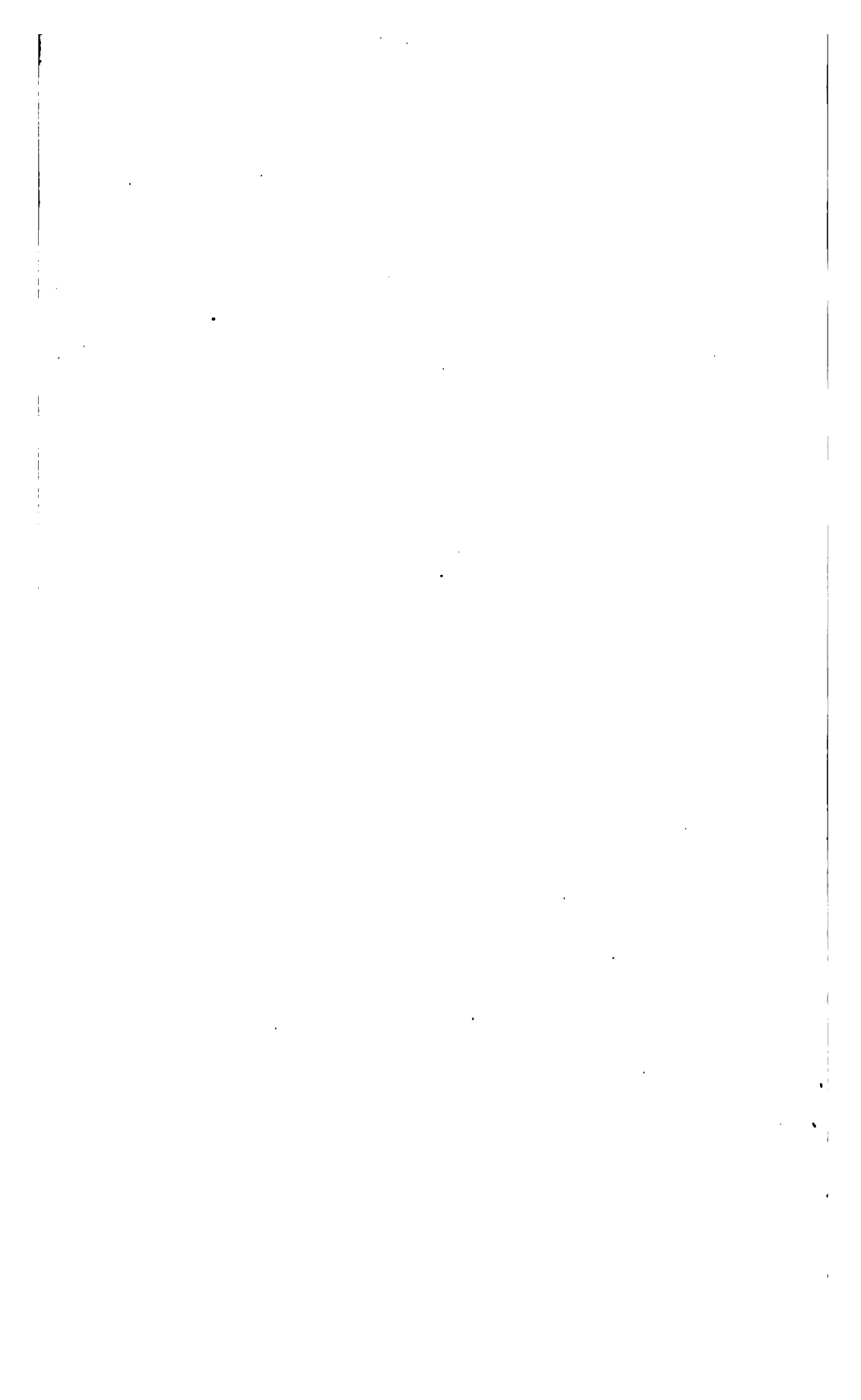
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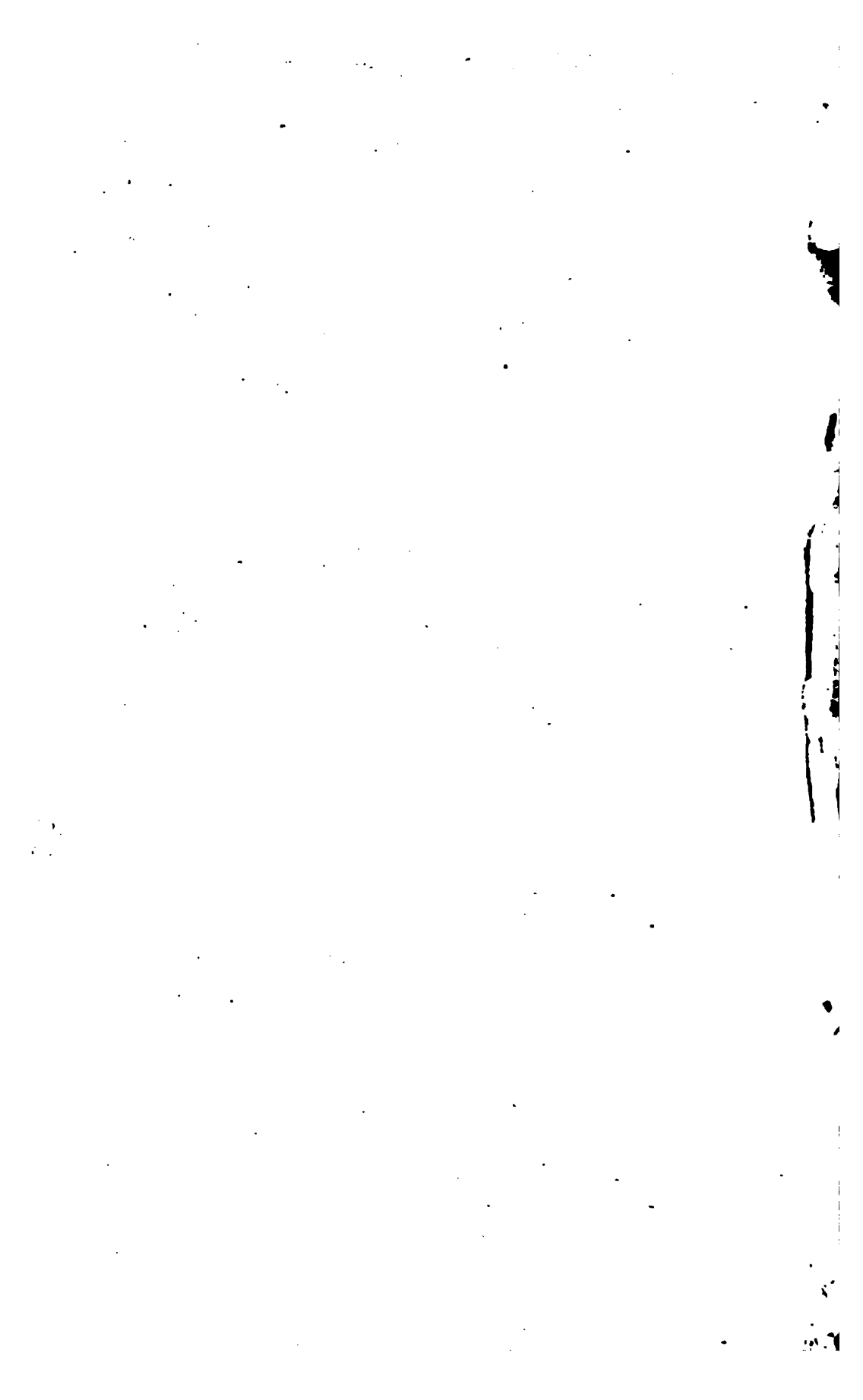
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